Supreme Court, U.S.
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No. ____ - _____

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In The Supreme Court of The United States

JACQUELINE EVERSON, PETITIONER

v.

LIBERTY MUTUAL ASSURANCE COMPANY, E.R.I.S.A. PLAN LONG-TERM DISABILITY INSURER

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

Petition For A Writ Of Certiorari

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Petitioner is Pro se

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred in rejecting the precedent set by The Supreme Court, in *Metlife v. Glenn*, 128 S.Ct. 2343 (2008), and instead relied on Griffis v. Delta Family-Care Disability, 723 F.2d 822, 825 (11th Cir. 1984), holding that the claim administrator of an ERISA plan, who also funds that plan is not "unreasonable" to deny disability benefits regardless of the quality and quantity of medical evidence adduced by claimant, as long as the administrator is able to produce a single piece of evidence no matter how obscure or untrustworthy?

2. Whether any of the Court's procedural and evidentiary rulings constituted an abuse of discretion requiring reversal of the judgment?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings at the Eleventh Circuit are Petitioner-Plaintiff, Jacqueline Everson, and Respondent-Defendant, Liberty Mutual Assurance Company, the long-term disability Plan for Associates of The Coca-Cola Company. Liberty Life Assurance Company of Boston accepted service of the original complaint, and is proceeding as Respondent in this case. There are no other parties.

RULE 29.6 STATEMENT

Liberty Life Assurance Company of Boston is a member of the Liberty Mutual Group. Liberty Life Assurance Company of Boston is a wholly owned subsidiary of Liberty Mutual Holding Company.

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INTRODUCTION

Petitioner, Jacqueline Everson, respectfully petition for a writ of certiorari to review the United States Court of Appeals decision denying review. That decision, following prior Eleventh Circuit precedent, after delaying this case until the Supreme Court ruled in *Metlife v. Glenn*, in 2008, the Eleventh Circuit rejected the precedent set by the Supreme Court and held that, it relied on Griffis v. Delta Family-Care Disability, 723 F.2d 822, 825 (11th Cir. 1984), conflicting with the Supreme Court and two Circuits in holding that the claim administrator of an ERISA plan, who also funds that plan is not "unreasonable" to deny disability benefits regardless of the quality and quantity of medical evidence adduced by claimant, as long as the administrator is able to produce a single piece of evidence no matter how obscure or untrustworthy, and (2) whether the Court's procedural and evidentiary rulings constitute an abuse of discretion requiring reversal of the judgment. This ruling is in conflict with the Supreme Court and two other Circuits, 29 U.S.C §1133, contravenes Congress' set standards under ERISA § 1104(a)(1)(B), and merits this Court's review.

(1) Respondent relied on one IME report, over more reliable evidence, including two diagnostic tests, (2) failed to provide its only expert with all medical records, (3) failed to take account of all aspects of petitioner's pathology, and (4) The Eleventh Circuit found the only IME relied on to be inconsistent and belied by all the medical evidence in the file. (T-19-48)

OPINION BELOW

The United States Court of Appeals denied review March 19, 2009, for lack of jurisdiction (App. A). The United States Court of Appeals denied a timely Motion for Reconsideration, April 21, 2009 (App. B). The U.S. District Court, Order on Summary Judgment, November 2, 2006 (App. C). The U.S. District Court Findings and Conclusions of Law, January 2, 2009 (App. D). Respondent filed its bill of cost, January 30, 2009 [80]. The U.S. District Court granted bill of costs, February 2, 2009 [81]. Followed by Petitioner's 2nd Notice of appeal, February 3, 2009 [82]. Based on Petitioner's Social Security application filed on March 3, 2004, The Administrative Law Judge Order, Quoted: "I found you to be disabled on August 29, 2003, because of degenerative joint disease so severe that you are unable to perform any work existing in significant numbers in the national economy." (T-35-38) Petitioner has corrected this Petition according to the U.S. Supreme Court Clerk notice dated June 9, 2009, due within 60 days.

JURISDICTION

The Judgment of the Court of Appeals was April 21, 2009, and the time for filing this petition is July 19, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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1 References to the Petitioner's "Appendix" to the Eleventh Circuit are preceded by "**App**"

2 References to the Petitioner's Trial Transcript in the Eleventh Circuit are preceded by "**T**"

STATUTES AND REGULATIONS INVOLVED

The Employee Retirement Income Security Act of 1974, as amended ("ERISA") provides:

ERISA imposes higher-than-marketplace quality standards on insurers. It sets forth a special standard of care upon a plan administrator, namely, that the administrator "discharge [its] duties" in respect to discretionary claims processing "solely in the interests of the participants and beneficiaries" of the plan, §1104(a)(1);

29 U. S. C. §1104(a)(1).

The purpose of § 1133 is to "notify [ ] claimant of [the plan administrator's] reasons for denying the claims and affording a fair opportunity for review," Wenner v. Sun Life Assur. Co. of Canada F.3d, 2007 WL 1080307 C.A.6 (Tenn.) (April 12, 2007).

29 U.S.C. § 1133(1)

Violated § 1133(2) by failing to "afford a reasonable opportunity to [ ] claimant for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 U.S.C. § 1133(2)

STATEMENT

Jacqueline Everson ("Everson") was employed by The Coca-Cola Company from 1988 until she became disabled, August 29, 2003. The Coca-Cola Company paid Everson for six months short-term disability (maximum benefits), beginning August 29, 2003, Everson's last day at work. Everson's final position with The Coca-Cola Company was a Sr. Finance Analyst. (R-419, 420), (T-20)

Respondent, Liberty Mutual/Liberty Life Assurance of Boston ("Liberty") is the long-term disability insurer for The Coca-Cola Company. Everson paid a premium for long term disability benefits, an ERISA group benefit. In this case, the plan grants "the administrator, or fiduciary" (both) discretionary authority to determine eligibility for benefits, and pays awarded benefits. (T-21)

September 10, 2003, MRI of Cervical Spine performed at Resurgens Imaging. (T-25)

Review of records:

C4-5 Right posterolateral focal Disc Herniation exerting a mass effect upon the corresponding right/left central nerve roots, mild flattening of the anterior lateral aspects of the cord, consistent with myelomalacia. C5-6 Moderate associated broad based circumferential disc bulge noted abutting the central nerve roots bilaterally. C6-7 Mild Broad Based Disc Bulge. Multi-level spondylosis with osteophytosis. (R-359-360)

* January 22, 2004, Dr. Stewart office visit Report; "Everson's symptoms are aggravated by activity." (R347)

* February 4, 2004, Liberty's Attending Physician Statement was completed by Dr. Stewart, Everson's treating physician, at Liberty's request: (R-345, 346)

Diagnosis; cervical radiculopathy, carpal tunnel syndrome, **Prognosis**; Fair, will likely remain in pain for prolonged period, **Proposed treatment plan**; **Prescription drug therapy**: Vicodin, clinoril, & flexeril. Patient did not tolerate physical therapy; she may be a candidate for surgery, **Physical Impairment**: Class 5-Severe limitation of functional capacity, incapable of minimum activity. (App. D, pg. 11), (App. C, pg. 4),

* April 14, 2004, Dr. Steve, hired by Liberty reviewed Everson's cervical MRI and medical records, and advised Liberty: (T-27) (R-88), (App. D, pg. 38)

Everson is totally disabled from working. Approve the claim, and follow-up on Social Security. Everson is not a good candidate for assisting with return to work. Based on a diagnosis of cervical spine radiculopathy. (R-88) (App. D, pg. 38)

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2 References to the Petitioner's Trial Transcript in the Eleventh Circuit are preceded by "T"

3 References to Liberty's Claim Records in the Eleventh Circuit are preceded by "R-"

4 Medical Records Liberty failed to provide to its only (IME) Dr. D'Auria in the Eleventh Circuit are preceded by (*)

April 14, 2004, Liberty approved Everson for 24 month own-occupation benefits, and Liberty paid retroactive from February 5, 2004. Liberty required Everson to apply for Social Security, and offered legal assistance. (T- 27)

* April 14, 2004, Dr. Gower, Neurosurgeon with NW Neurosurgical Associates performed a Functional Capacity Exam (FCE) on Everson, and reported; (T-27)

Fine and gross coordination of affected extremity: LUE (left upper extremity) - poor grasping & motor control. Numb whole LUE (left upper extremity).

Give examples of functional use of impaired extremity (Examples of inability to perform fine and gross movements effectively: Need help with grooming, laundry, shopping, lifting & cooking. No filing, sort or handle papers. (R-38-41)

April 15, 2004, Liberty Mutual Physical Capacities Exam (FCE), on Everson was completed by Dr. Stewart, at Liberty's request: (T-40)

FCE reported; Reaching below shoulder level 1 hr., Handling/grasping 0 hrs., Fine finger dexterity 0 hrs.
Can the person work 8 hours per workday? NO
Due to patient's severe chronic pain, this patient is 100% disabled. (R-298), (App. C, pg. 9)

* May 13, 2004, Dr. Smazik, second physician hired by Liberty reviewed Everson's medical records for continued benefits reports: (App. D, pg. 12-13)

Everson's medical supports her diagnosis of cervical radiculopathy, and her medical care has been appropriate. He reconfirmed Everson is disabled, and Liberty continued to pay benefits. (R-87)(App. D, p. 38)

October 18, 2004, Susan McCormack, Liberty's nurse disputed Everson's claim, (after reviewing same medical records as Dr. Stewart, and Liberty's two consulting physicians): (T-28) (App. C, pg. 9-10)

Liberty's nurse coordinated surveillance on Everson, completed an IME referral, submitted a request to arrange an IME with an Orthopedic with questions. Liberty's nurse (later) coordinated Everson's IME with Dr. D'Auria, and requested "part" of Everson's medical records from Dr. Washington. (R-83, 86, 122)

November 18, 2004, Electromyography of upper extremities (EMG) diagnostic test. Everson's primary care physician, Dr. Stewart referred Everson to the Atlanta Neuromuscular Diagnostics center. The results reported by Dr. Washington: (App. C, 10)

This examination is remarkable for increased upper extremity reflexes, pectoralis major, infraspinatus, right biceps, lumbrical and triceps weakness is observed. There is atrophy of the right biceps and deltoid.

Electromyography was remarkable for evidence of spontaneous activity and chronic denervation and reinervation noted in the left deltoid, biceps and infraspinatus.

This is an abnormal study. The electrodiagnostic evidence is consistent with bilateral upper and mid cervical radiculopathies. The findings are severe and consistent with both ongoing active as well as chronic denervation. Diagnostic considerations include cervical spondylosis, and multi-level disc disease. (R-178-179), (App. C, pg. 10)

December 13, 2004, **Dr. D'Auria**, Orthopedic specialist (IME examiner) hired by Liberty. Everson attended one fifteen minute medical exam scheduled by Liberty. All doctors visited by Everson were identified on this report. Liberty provided some specific questions on the IME for Dr. D'Auria to answer, and he reported: (App. C, pg. 38-41), (R-186-192), (T-29)

The claimant's diagnosis is cervical radiculopathy. Based on your review of the medical information provided, your physical examination, and prevailing medical standards, is this the correct diagnosis?

Yes, based upon my review of the medical information provided, my physical examination, and prevailing medical standards, this is the correct diagnosis. The claimant does have a mild radiculopathy, which has been improving over time with the procedures performed and the medical care that she has received

She reports seeing Dr. Stewart, her primary care physician since 2002. He referred her for an MRI scan of the elbow. She continues to see him about every two months now. She saw him last on December 6, 2004.

She has been evaluated and treated by the appropriate specialist; all of them have concurred that her condition is stable, is nonsurgical, and does not require any active on-going medical treatment at this time. The only recommendation is that she perform a home exercise program on a regular basis.

The claimant does have a mild cervical radiculopathy, which has been improving over time with the procedures performed and the medical care that she has received. Based on the findings on the physical examination, the radiculopathy is continuing to improve clinically.

She reports also having an EMG study most recently on November 18, 2004, which was positive for bilateral cervical radiculopathy, which was severe. (R-186-192)

* December 21, 2004, Dr. Stewart, Everson's treating physician referred her back to the Atlanta Neuromuscular Diagnostics center for a follow-up Neurological examination, and a review of Everson's medical records performed by Dr. Washington: (T-29-30)

Medications: Vicodin, Sulindac, Flexeril 10mg 2/day

Neurological Examination:
The examination is remarkable for increased upper extremity reflexes. The motor examination is remarkable for 4/5 weakness of the right biceps, infraspinatus, pectoralis major, and lumbrical.

The examination is also remarkable for increased pinprick sensation of the C5-6 dermatome.

Review of records: MRI of cervical spine dated 09-10-2003 demonstrates evidence of focal disc compression with mass effect upon right central C5 root with evidence of flattening of the anterior spinal cord.

Impression and Recommendations:
Cervical myeloradiculopathy, the patient continues to be symptomatic with evidence of upper motor neuron and lower motor neuron weakness.

Plan: Surgical consultation is likely to be required. Continue conservative management until then (R-36)

February 3, 2005, Liberty's termination letter #1: (T-21, 22)

Dr. D'Auria, orthopedic surgeon opined that your diagnosis of cervical radiculopathy is the correct diagnosis, though it is mild, and has been improving over time with the medical care you have been receiving. Based on his physical examination you are improved clinically. Therefore our assessment was based on Dr. D'Auria's opinion. (R-198-200).

February 7, 2005, Liberty's letter to Everson requesting Social Security reimbursement after Everson's claim was closed confirms her claim will be reconciled when approved by Social Security: (T-38)

If you are awarded Social Security benefits, you can expect to receive a retroactive benefit payment in 30-60 days. The Social Security Administration will send you an Award Letter, detailing the amount of your benefit. Please send us a copy of this letter, so that we can correctly calculate your future long-term disability benefits. (R-195)

February 7, 2005, Dr. Stewart's letter to Liberty is in disagreement that Everson is no longer considered disabled: (T-39)

Jacqueline Everson is permanently and totally disabled due to chronic, severe, neuropathic pain from Her cervical spine. Please review the additional medical evaluation (MRI of cervical spine and EMG of upper extremities). Please contact me for related concerns. (R-181)

February 18, 2005, Liberty reopened Everson's claim to review EMG graphs;

We are writing at this time to advise you that we have reopened your claim until a final determination regarding your eligibility is determined, pending review of the raw data from the EMG/NCS results." (R-165) (T-31)

March 7, 2005, Liberty's letter confirms they only considered an FCE; (T-127-130)

We considered the FCE testing in the absence of the raw data from the EMG/NCS testing done by Dr. Washington, due to your doctor being in disagreement. (R-155-156)

March 29, 2005, Liberty's termination letter #2; (T-22)

We are writing to advise you that Dr. Washington did not provide medical documentation to alter the original decision made by Independent Medical examiner, Dr. D'Auria. (R-109-110)

April 8, 2005, Liberty's Letter to Everson denied Everson's appeal for benefits: (T-93-94)

We have completed our review of your request for reconsideration of your long term disability benefits. However, we are unable to alter our determination to deny benefits beyond March 29, 2005.

Therefore, we suspended your benefits until you either attended an FCE or provided the raw data to the EMG. On March 16, 2005, we received a copy of the raw data from the Atlanta Neuromuscular Diagnostic center. (R-58-61) "FCE has no merit".

Appeal denial Included vocational assessment/Occupation Analysis "occ. keyboarding intensive" (R-330-333, 339).

May 12, 2005, Liberty's second letter to Everson requesting reimbursement from her future Social Security Disability benefits, after Liberty closed Everson's claim, stating that she is no longer considered disabled, but "arrogantly" stated they expected the SS Administration to pay benefits: (R-395)

Since Liberty paid you full disability benefits for the period March 5, 2004 to March 29, 2005, we in effect advanced you the money we expect Social Security will ultimately pay.

If you are awarded Social Security benefits, please do not spend any money received until you are notified by Liberty Life Assurance Co. of the amount you are overpaid. (R-395-396)

August 7, 2007, Everson provided Liberty's attorney with a copy of her Social Security disability award letter, as soon as she received it, which was included in the [51] Joint Pre-trial Order transmitted by Liberty (pg. 46) it was also included in the December 16, 2009, Plaintiff's trial exhibits (T-35). Everson was approved for Social Security ("SS") in March 2007, but found to be disabled since August 29, 2003, by the Administrative Law Judge, and was paid retro back pay beginning, March 2004. Liberty is entitled to monthly offsets, less attorney fees paid to Friedman & Associates, which Liberty also has in its file. (T-35, 38, 103), (R-400-401).

Liberty refused to reconcile Everson's claim as indicated in its letters to petitioner on; February 7, 2005, and May 12, 2005, and confirms Liberty expected SS to approve the claim after the claim was closed, while SS was still pending, and after Liberty found petitioner to be no longer disabled, but failed to reconcile the claim. (R-195, 395-396)

A. Eleventh Circuit Case Facts & Reason for Writ

Petitioner appealed the denial of her long-term disability benefits by filing a Complaint in the United States District Court for the Northern District of Georgia pursuant to 29 U.S.C. § 1132(A), [1]. The District Court denied petitioner's Motion for Judgment on the Administrative Record, and denied respondent's Cross Motion for Judgment, but held that respondent relied on Dr. D'Auria's IME report, and concluded it has several inconsistencies, and cannot be said to be more reliable than the other medical evidence in the record [36]. Petitioner filed her 1st notice of appeal on November 9, 2006, following the Order on Summary Judgment [37].

April 22, 2008, Petitioner Motioned the District Court to set the trial [64].

May 8, 2008, Liberty Responded in opposition, and asked the District Court not to schedule the trial until the Supreme Court ruled in *Metlife v. Glenn*, and that it's ruling should have a direct impact on the standard of review in this case [66]. (T-32, 33, 34, 35)

December 16, 2008, the trial was held in District Court rejecting the 2008, Supreme Court ruling, instead purporting to apply this Court's decision in *Callough v. E.I. du Pont de Nemours & Co.*, 941 F. Supp. 1223, 1228 n.3 (N.D. Ga. 1996); also *Carr v. The Gates Health Plan*, 195 F.3d 292, 294 (7th Cir. 1999), and Griffis v. Delta Family-Care Disability, 723 F.2d 822, 825 (11th Cir. 1984), and concluding "As a result, this Court is limited to determining whether [Liberty Life's decision] was made rationally and in good faith - not whether it was right." (App. D, pg. 29).

Everson filed two Notice of Appeal(s) in this case: November 9, 2006 [37], and February 3, 2009 [82] following these rulings in the Eleventh Circuit;

1. 11/02/06, Order On Summary Judgment [36]
2. 01/30/09, Respondent submitted Bill of Cost [80]
3. 02/02/09, Judgment granting Bill Of Cost [81]

Everson filed her appeal in The United States Court of Appeals for the Eleventh Circuit (11th) on March 10, 2009. The appeal was deemed complete, but Review was denied for lack of jurisdiction due to timeliness of filing February 3, 2009, Notice of Appeal (App. A). A timely Motion for Reconsideration was denied April 21, 2009 (App. B). April 24, 2009, Petitioner filed her Notice of Intention to Apply for Certiorari in United States Court Of Appeals for the 11th Circuit, followed by this timely request for Review by The Supreme Court of The United States.

The Northern District Court granted judgment "In sum, based upon (1) the opinion of Dr. D'Auria that Plaintiff was not disabled and had embellished her symptoms; (2) the report of Dr. Heller that he could not form an opinion as a result of Plaintiff's embellishment of systems; (3) Plaintiff's refusal to attend a functional capacity evaluation at the request of Liberty; (4) the apparent absence of any affirmative course of treatment or medical corroboration of Dr. Stewart's opinion concerning Plaintiff's disability; (5) Plaintiff's apparent failure to follow certain treatment recommendations of the specialists she visited; and (6) Liberty's conduct during the course of Plaintiff's appeal including thorough investigation and voluntary reinstatement of Plaintiff's benefits until the final resolution of her appeal, the Court concludes that Liberty's decision to terminate Plaintiff's benefits was not arbitrary and capricious." (App. D, pg. 41)

B. The Eleventh Circuit's Reasoning Analysis Summary Judgment Order On The Record Is In Total Conflict With Its Own Judgment (App. C) v. (App. D):

"As an initial matter, the Court observes that Plaintiff's evidence lends support to her claim of disability." (App. C, pg. 36) v. (App. D, pg. 41 (1))

"Indeed, several inconsistencies in Dr. D'Auria's report convince this Court that it cannot be said to be more objectively reliable as a matter of law than the other medical evidence in the record." (App. C, pg. 38, 43) & (T-120) v. (App. D, pg. 41 (1))

[36] Order On Summary Judgment (App. C)
[Story, 2006] Quotes;

"In addition, Dr. Washington's interpretation of the EMG she performed in November 2004, which was offered shortly before Liberty terminated Plaintiff's benefits, bolsters Plaintiff's claim of disability." (App. C, pg. 37) v. (App. D, pg. 41 (2)(4)(5))

"Dr. Washington also suggested that Plaintiff may have other debilitating spinal conditions, including cervical spondylosis and multilevel disc disease, and indicated that "surgical consultation is likely to be required." (App. C, pg. 37, 38-39) v. (App. D, (4)(6))

"Defendant, however, apparently rejected this evidence of Plaintiff's disability, and instead relied on the opinion of Dr. D'Auria." (App. C, pg. 37)

"Drs. Stewart and Washington's status as examining physicians emphasizes that they had actual contact with Plaintiff, rather than a mere opportunity to examine her on one occasion and review her medical file, which speaks to the reliability of their conclusions. Cf. Godfrey v. Bellsouth Telecomms, Inc., 89 F.3d 755, 758-59 (11th Cir. 1996) (observing potential usefulness of in personal exam of fibromyalgia patient in ascertaining disability)." (App. C, pg. 37-38) v. (App. D, (1)(2)(6)

The Court totally conflicts in its Order on Dr. Heller v. the judgment. (App. C, pg. 42-43) v. (App. D, pg. 41 (2)) "Not more reasonable or reliable evidence."

[36] Order On Summary Judgment (App. C)
[Story, 2006] Quotes;

"Plaintiff's treating doctor, Dr. Stewart – who observed Plaintiff most frequently and over the longest period of time-steadily maintained that Plaintiff's condition rendered her "100% disabled." (App. C, pg. 36 – 37)

"Dr. D'Auria's opinion, which virtually stands alone in its minimization of the severity of Plaintiff's condition among the seven doctors with whom Plaintiff visited, is subject to questioning in at least several respects." (App. C, pg. 38)

"During the same time period, Dr. Stewart stated that Plaintiff's condition was worsening, and Dr. Washington's observations underscored the severity of Plaintiff's condition."(App. C, pg. 40)

"Moreover, Dr. D'Auria conceded that Plaintiff was at least partially disabled at the time of termination, and acknowledges that the dispute is only over the "extent of disability." (App. C, pg. 41)

"In light of Liberty's inherent conflict-of-interest, the Court cannot conclude that its reliance on Dr. D'Auria's opinion over that of Drs. Stewart and Washington was objectively reasonable as a matter of law." (App. C, pg. 41)

"Liberty relies on Dr. Heller's January 2004 report; However, these observations were made over one year prior to Liberty's decision. What is more, these observations were considered by Liberty in its initial determination that Plaintiff was "disabled" and entitled to an award of benefits. In light of the fact that Liberty itself apparently did not attach much significance to Dr. Heller's observations during Plaintiff's single visit with him - this evidence cannot be said to be more reliable as a matter of law than the conflicting medical evidence adduced by Plaintiff." (App. C, pg. 38-43) v. (App. D, pg. 41 (2))

"Finally, Liberty relies on the fact of Plaintiff's refusal to attend a functional capacity evaluation as evidence of Plaintiff's ineligibility for disability payments. However, Liberty made this request after its "initial termination" of Plaintiff's benefits, during the process of Plaintiff's appeal." (App. C, pg. 42-43) & (T-129-31)- Court disagreed v. (App. D, pg. 41 (3)).

The Court disregarded Liberty's Attending Physician Statement completed by Dr. Stewart, which included; Diagnosis, Prognosis, Proposed treatment plan, Prescription drug therapy, and Physical Impairment, and his expert testimony during trial App. C, pg. 8-9),(T-50-54) v. (App. D, 41 (4)). Two physicians hired by Liberty agreed that Dr. Stewart's treatment plan is appropriate to follow, after certain earlier treatment recommendations by specialists were not included. (App. D, 38) v. (App. D, pg. 41 (5)). Liberty's conduct was arbitrary in reviewing evidence during appeal(App. C, pg. 38-41) v. (App. D, pg. 41 (6))

REASONS FOR GRANTING THE PETITION

The new ruling in the Eleventh Circuit conflicts with the most recent Supreme Court ruling in Metlife v. Glenn, Sixth, and Ninth Circuit rulings, 29 U. S. C. §1104(a)(1)(B), 29 U.S.C. § 1133, and (App. A-D)

This ruling is certain to cause further confusion, and splits within the Circuits, and requires immediate supervisory power to avoid future conflicts, and protect the rights of disabled ERISA claim participant's as Congress intended under §1104, and §1133. This Court has jurisdiction to review this case.

The Eleventh Circuit delayed scheduling the trial in this case until the Supreme Court ruled in *Metlife v. Glenn*, but instead relied on a 1984 ruling that fosters a conflict within the Circuits in the evaluation of the claim administrator's decision to terminate benefits based on "reasonableness". (App. D)

As a result, the Eleventh Circuit holds that it is "limited to determining whether the [administrator's decision] was made rationally and in good faith – not whether it was right." *Griffis v. Delta Family-Care Disability*, 723 F.2e 822, 825 (11th Cir. 1984) (App. D) - Conflicts with the Supreme Court, and Two Circuits.

The Court is required to review "the quality and quantity of the medical evidence and the opinions on both sides of the issues." Metlife v. Glenn, and McDonald v. Western-Southern Life Ins. Co., 347 F.3d 161 (6th Cir.),(2003). (App. C, pg. 38-43) v. (App. D)

If this Court ruled that the kind of arbitrary and capricious determination at issue here—and present in other cases—is not grounds for reversal of the Court and administrator's decision for purposes of a Firestone analysis, and Metlife v. Glenn analysis many of these cases could easily be resolved—as in this case—solely on the basis of a single piece of evidence no matter how obscure or untrustworthy to deny benefits, without a court's having to weigh the opinions on both sides or give any regard to the conflict of interest. *Firestone Tire & Rubber v. Bruch,,*489 U.S. 101 (1989). (App. C, pg. 40) (T-19-48)

As in this case, Courts would be rendered to nothing more than rubber stamping the administrator's claim decision even when these egregious circumstances are involved; The administrator who decides claims and pays claims in and ERISA claim (1) required claimant to apply for Social Security, and failed to reconcile the closed claim according to its written notice (2) relied on one medical report, over more reliable evidence, including two diagnostic tests (3) failed to provide its only expert with all medical records (4) failed to take account of all aspects of petitioner's pathology. (5) Even when the Court found the only report to be inconsistent and belied by all the medical evidence in the file. *Everson v. Liberty Mutual Assurance Company,* No. 1:05-CV-2459-RWS,(App. C),(T-119-21)

The Eleventh Circuit Conflicts With § 1133 In Granting Judgment Contrary to Evidence, When By Law Respondent Gave One Reason For Terminating Benefits (Dr. D'Auria) (App. C, pg. 41)(T-39)

The Eleventh Circuit's message is clear; It gives Courts discretion in choosing what precedent they prefer, and to claim administrators who decide claims and pay claims, this ruling fosters unfair claims evaluations, and repeated offenses of arbitrary and capricious claims practices under ERISA laws:

Kalish v. Liberty Mutual / Liberty Life Assurance Co., 419 F.3d 501 (6th Cir. 2005) (remanding for retroactive reinstatement of benefits where plan administrator arbitrarily and capriciously refused to consider evidence of claimant's depression as factor in disability).

[36] Order On Summary Judgment on the record (App. C) [Story, 2006] Quote:

"Plaintiff was examined by Dr. Ralph D'Auria, an orthopedic surgeon hired by Liberty. According to Plaintiff's undisputed statements, Dr. D'Auria spent approximately fifteen minutes examining Plaintiff." (App. C, pg. 11)

"Dr. D'Auria's conclusion that Plaintiff was improving and would regain her normal strength and normal function" within three to four months is simply belied by virtually all other evidence in the record." (App. C, pg 40]

* Both termination letters identify Dr. D'Auria' opinion as the only reason for termination of benefits. (R-109-110, R-198-200), (App. C, pg. 41)

I. This Court Should Grant Review of this Petition, and Reverse the Eleventh Circuit's Ruling, Rejecting the Precedent Set by The Supreme Court, in *Metlife v. Glenn*, and Instead Relied on *Griffis v. Delta Family-Care Disability,* 723 F.2d 822, 825 (11th Cir. 1984), Holding That the Claim Administrator of An ERISA Plan, Who Also Funds That Plan Is Not "Unreasonable" To Deny Disability Benefits Regardless Of The Quality and Quantity of Medical Evidence Adduced By Claimant, As Long As The Administrator Is Able To Produce a Single Piece of Evidence No Matter How Obscure Or Untrustworthy (A.) Eleventh Cir. Case Facts, pg. 15)), (App. A-D), (App. C, pg. 27, 36-43) v. (App. D, pg. 30-31, 41)

As noted, the Eleventh Circuit holds, in this case that "[A]n abuse of discretion or arbitrary and capricious standard means that the reviewing court will affirm merely if the administrator's decision is reasonable given the available evidence, even though the reviewing court might not have made the same decision if it had been the original decision-maker." *Callough v. E.I. du Pont de Nemours & Co.*, 941 F. Supp. 1223, 1228 n.3 (N.D. Ga. 1996); also *Carr v. The Gates Health Plan*, 195 F.3d 292, 294 (7th Cir. 1999). As a result, this Court is "limited to determining whether [Liberty Life's decision] was made rationally and in good faith – not whether it was right." *Griffis v. Delta Family-Care Disability*, 723 F.2e 822, 825 (11th Cir. 1984)." (App. D, pg. 29) v. (App. C, pg. 27)

The Eleventh Circuit found that it was "entitled to grant judgment" to a claim administrator of an ERISA plan, who also funds that plan and; (1) required Everson to apply for Social Security, approved her for 24 month own-occupation disability, but terminated her benefits after 13 months, and failed to reconcile the claim according to policy. (2) inappropriately selective consideration of Everson's medical records. (3) failure to provide full case information to its own independent expert, and (4) failure to consider all aspects of Everson's pathology. (App. D, pg. 41), (T-19-48) also See Statement records.

The Supreme Court of the United States, and the Sixth Circuit, in *Metlife v. Glenn*, 128 S.Ct. 2343 (2008), held that these facts - as in this case, "are relevant", and is arbitrary and capricious.

A. The Eleventh Circuit Ruling Directly Conflicts With Decisions In The Supreme Court of The United States, Two Other Circuits, 29 U. S. C. §1104(a)(1)(B), and 29 U.S.C. § 1133.

This is a clear split in the circuits on this question. After delaying the trial until the Supreme Court ruled in Metlife v. Glenn, the Eleventh Circuit instead relied on *Griffis v. Delta Family-Care Disability*, 723 F.2d 822, 825 (11th Cir. 1984), and conflicts with 29 U.S.C. § 1133 in granting judgment for three reasons, when termination letters only list one reason for termination. (App. C, pg. 27, 31)

The Supreme Court of the United States, and the Sixth Circuit, set the precedent in Metlife v. Glenn, and fosters 29 U. S. C. §1104(a)(1)(B). In reaching its decision, the Sixth Circuit, and the Supreme Court discussed several factors in MetLife's consideration of Glenn's claim that it found relevant: the conflict as decision maker and payor of benefits, the conflict with the Social Security Administration determination of disability, inappropriately selective consideration of Glenn's medical record, MetLife's failure to provide full case information to its own independent experts, and failure to consider all aspects of Glenn's pathology. "Taken together," said the Court, "these factors reflect a decision by MetLife that can only be described as arbitrary and capricious." The Supreme Court concluded that this conduct was so egregious that it was an abuse of discretion even if there were no conflict at all. *Metlife v. Glenn*.

The Sixth Circuit holds that the arbitrary-and-capricious standard . . . does not require the Court merely to rubber stamp the administrator's decision." Jones v. Metro Life Ins. Co., 385 F.3d 654, 661 (6th Cir. 2004) (citation omitted). Instead, the Court is required to review "the quality and quantity of the medical evidence and the opinions on both sides of the issues." McDonald v. Western-Southern Life Ins. Co., 347 F.3d 161, 168 (6th Cir. 2003)." (App. D, pg. 41)

Otherwise, courts would be rendered to nothing more than rubber stamps for any plan administrator's decision as long as the plan [administrator] was able to find a single piece of evidence – no matter how

obscure or untrustworthy – to support a denial of a claim for ERISA benefits. McDonald v. Western-Southern Life Ins. Co., 347 F.3d at 172 (6th Cir. 2003). (App. C, pg. 38-41) also, See termination letters confirming Dr. D'Auria as sole reason for both terminations. (R-109-110, 198-200)

Kalish v. Liberty Mutual / Liberty Life Assurance Co., 419 F.3d 501 (6th Cir. 2005) (remanding for retroactive reinstatement of benefits where plan administrator arbitrarily and capriciously refused to consider evidence of claimant's depression as factor in disability); Williams v. Int'l Paper Co., 227 F.3d 706 (6th Cir. 2000) (remanding for retroactive reinstatement of benefits where plan administrator had opportunity to review all evidence and did so in a manner that was arbitrary and capricious. (App. C, pg. 39)

Similarly, the Ninth Circuit held in *Newcomb v. Standard Ins. Co.*, 187 F.3d.1004, 1006, 23 EBC 2045 (9th Cir. 1999) (since treating doctors have special expertise, lone opinion of insurance company doctor does not overcome substantial evidence provided by plaintiff's treating doctor(s). (App. C, pg. 39, 41)

ERISA imposes higher-than-marketplace quality standards on insurers. It sets forth a special standard of care upon a plan administrator, namely, that the administrator "discharge [its] duties" in respect to discretionary claims processing "solely in the interests of the participants and beneficiaries" of the plan; 29 U. S. C. §1104. (App. C, pg. 39-43)

II. Whether Any Of The Court's Procedural And Evidentiary Rulings Constitute An Abuse Of Discretion Requiring Reversal of The Judgment?

The party is required to show that the error probably resulted in an improper judgment. *Brownsville,* 897 S.W.2d at 753; *McCraw v. Maris,* 828 S.W.2d 756, 758 (Tex.1992) In making the determination whether the case "turns" on the evidence in question, the appellate court reviews the entire record. *Able,* 35 S.W.3d at 617; *Timberwalk Apartments, Partners, Inc. v. Cain,* 972 S.W.2d 749, 756 (Tex.1998). *Brownsville,* 897 S.W.2d at 754; *Boothe v. Hausler,* 766 S.W.2d 788, 789 (Tex.1989).

A. Petitioner Filed two Notice of Appeals in this Case:
1. November 9, 2006 [37]
2. February 3, 2009 [82]

Notice of Appeals were Filed following these Rulings:
1. 11/02/06, Order On Summary Judgment [36]
2. 01/30/09, Respondent submitted Bill of Cost [80]
3. 02/02/09, Judge granted Bill Of Cost [81]

Facts: Petitioner filed Appeal in The U.S. Court of Appeals for the Eleventh Circuit on March 10, 2009. The appeal was deemed complete, but Review was denied for lack of jurisdiction due to timeliness of the filing of her February 3, 2009, Notice of Appeal. Everson's timely Motion for Reconsideration was denied on April 21, 2009. Petitioner is requesting that a Review be granted by this Court for the above listed reasons, and associated public importance.

B. The Court disregarded 29 U.S.C. § 1133 (1)(2), and is in conflict with the records only reason for termination (Dr. D'Auria's opinion), of Petitioner's extent of disability. (App. C, pg. 41)

1. 2/3/2005, Liberty's original termination letter #1

"Dr. D'Auria, orthopedic surgeon opined that your diagnosis of cervical radiculopathy is the correct diagnosis, though it is mild, and has been improving over time with the medical care you have been receiving. Based on his physical examination you are improved clinically. Therefore our assessment was based on Dr. D'Auria's opinion."

2. 3/29/2005, Liberty's termination letter #2

"We are writing to advise you that Dr. Washington did not provide medical documentation to alter the original decision made by independent medical examiner, Dr. D'Auria."- The Eleventh Circuit's ruling in this case conflicts with the Supreme Court, Sixth and Ninth Circuits, 29 U.S.C. §1104(a)(1)(B), and 29 U.S.C. § 1133. (App. D)

- The Eleventh Circuit delayed the trial until the Supreme Court ruling in Metlife v. Glenn, but instead relied on a conflicting ruling from 1984. (App. D)

- The Conclusions Drawn In The Ruling In The Eleventh Circuit Presents A Matter Of General Public Importance In The Administration Of Justice That Warrants A Direct Review By This Court.

C. The Court disregarded that Dr. D'Auria was not provided with all medical records. Five reports have been produced by Respondent. These five reports are not included in medical records Dr. D'Auria listed on his IME report under "available for review";

1. February 4, 2004, Liberty's Attending Physician's Statement, completed by Dr. Stewart, at Liberty's request. (R-345, 346)

2. April 14, 2004, Dr. Gower, Neurosurgeon, Northwest Neurosurgical Associates (FCE) (R-38-41)

3. April 14, 2004, Dr. Steve, Independent physician hired by Liberty. (R-88)

4. May 13, 2004, Dr. Smazik, Independent physician hired by Liberty. (R-87)

5. December 21, 2004, Dr. Washington, Neurological Exam, and review of records at Atlanta Neuromuscular Diagnostics. (R-36-37)

* 11/18/04, Diagnostic Electromyographic (EMG) reported; atrophy of the right biceps and deltoid. Spontaneous activity and chronic denervation and reinervation noted in the left deltoid, biceps and infraspinatus. Interpretation: Evidence is consistent with bilateral upper and mid cervical radiculopathies. The findings are severe and consistent with both ongoing active as well as chronic denervation, Diagnostic considerations include cervical spondylosis, and multilevel disc disease." (R-178-179)

C. December 13, 2004, Dr. D'Auria IME report confirms records Liberty provided for his review: (R-188-189)

MEDICAL RECORDS: The following medical records were available today for review:

- Stewart Family Practice records from 05/03/03, 06/21/03, 10/03/03, 11/07/03, 12/19/03, 03/05/04, 04/06/04, 06/21/04, 08/23/04, and 12/02/04.
- Resurgens Orthopedics records from 07/11/03, 08/01/03, 08/11/03, 08/29/03, 09/11/03, and 09/18/03.
- Resurgens Rehabilitation Services records from 08/07/03, 08/19/03, and 08/26/03.
- Cervical MRI scan report dated 09/10/03.
- Elbow MRI scan report dated 10/14/03.
- Emory Spine Center reports from 11/06/03, and 01/20/04.
- Physical Job Evaluation Form, completed by the employer on 02/03/04.
- Occupation Analysis prepared by Janette Purtell, Vocational Case Manager, on 03/09/04.
- Physical Capacities Form, completed by Dr. Stewart, on 04/15/04.
- Combined Questionaire, completed by the claimant on 04/27/04.
- EMG/NCV report dated 11/18/04

The Court disregarded that Respondent failed to provide all medical evidence to Dr. D'Auria.

D. The Court ignored that Respondent produced all the following medical reports. All the medical reports that support petitioner's claim of disability are identified by (*);

Medical Reviewed By Respondent Before Approval

* 09/10/2003 - Cervical MRI Diagnostic Test
* 09/18/2003 - Dr. Cone-Sullivan, Orthopedic Spec.
* 11/06/2003 - Dr. Levy, Orthopedic Specialist
01/20/2004 - Dr. Heller, Orthopedic - unsure
* 01/22/2004 - Dr. Stewart, Physical Impairment
* 02/04/2004 - Dr. Stewart, Attending Phy. Stmt.

Medical Reviewed By Respondent After Approval

* 04/14/2004 - Dr. Steve, Hired by Liberty
* 04/14/2004 - Dr. Gower, Neurosurgeon (FCE)
* 04/15/2004 - Dr. Stewart, Liberty's request (FCE)
* 05/13/2004 - Dr. Smazik, Hired by Liberty
* 11/18/2004 - Dr. Washington, Neurologist (EMG)
* 12/21/2004 - Dr. Washington, Neurological exam and review of medical records.

* 12/21/04, Neurological Exam and Review of Records reports: MRI of cervical spine dated 09/10/04, demonstrates evidence of focal disc compression with mass effect upon right central C5 root with evidence of flattening of the anterior spinal cord. Impression and Recommendations: Cervical myeloradiculopathy, patient continues to be symptomatic with evidence of upper motor neuron and lower motor neuron weakness. (R-36-37)

*Quality and quantity of evidence supports petitioner.

E. The Court and Respondent Failed To Consider All Aspects Of Petitioner's Pathology, and Extent of Injury; "Diagnosis = Cervical Radiculopathy" (R-186-192), (App. D, pg. 7-8, 13-14)

1. The District Court's [36] Order On Summary Judgment [Story, 2006], (App. C, pg. 19];

"The parties do not dispute that Plaintiff's health condition is an "injury" within the meaning of the Policy, and thus, it is not the fact of injury, but the extent of injury that is in dispute." (App. C, pg. 3)

2. Liberty confirmed Everson's "diagnosis=cervical radiculopathy" within its medical records file (T-):

3. 5/13/04, " Based on Physician limited assignment medical supports DX (diagnosis) of cervical radiculopathy" (R-87), and 12/13/04, IME (R-189)

Liberty provided Dr. D'Auria with specific questions to answer on the IME he completed; (R-186-192)

4. December 13, 2004, Dr. D'Auria's IME Report:

"The claimant's diagnosis is cervical radiculopathy. Based on your review of the medical information provided, your physical examination, and prevailing medical standards, is this the correct diagnosis?

"Yes, based upon my review of the medical information provided, my physical examination, and

prevailing medical standards, this is the correct diagnosis." (R-189), (T-19-48)

"Dr. Washington also suggested that Plaintiff may have other debilitating spinal conditions, including cervical spondylosis and multilevel disc disease, and indicated that "surgical consultation is likely to be required. (App. C, pg. 37)

"Defendant, however, apparently rejected this evidence of Plaintiff's disability, and instead relied on the opinion of Dr. D'Auria." (App. C, pg. 37)

Williams v. Int'l Paper Co., 227 F.3d 706 (6th Cir. 2000) (remanding for retroactive reinstatement of benefits where plan administrator had opportunity to review all evidence and did so in a manner that was arbitrary and capricious). (T-19-48), (App. C, pg. 37)

"Indeed, several inconsistencies in Dr. D'Auria's report convince this Court that it cannot be said to be more objectively reliable as a matter of law than the other medical evidence in the record." (App. C, pg. 38)

The Court's decision to accept Dr. D'Auria's opinion over diagnostic evidence, and other supporting opinions, after finding Dr. D'Auria to be unreliable is an abuse of discretion.(App. C, pg. 38-40)

The Court also granted witness fees in bill of costs submitted by Respondent on 1/30/09 for Charles Johnson, an unauthorized, last minute trial witness in violation of Rule 10. (T-6), (App. D, pg. 26)

This writ of Certiorari calls for this Court's immediate supervisory power to avoid future conflicts and protect the rights of disabled ERISA claim participant's who deserve a fair review of the claim administrator's decision to terminate benefits. The ruling in this case is concluding contrary to established principles in the Supreme Court, two other Circuits, and ERISA laws. (App. D, and App. C)

First, such a resolution can aid and protect the uniformity - central to the entire ERISA scheme – uniformity that is currently lacking because different circuits still impose different standards on ERISA administrators. The Supreme Court, and at least two circuits have issued agreeing decisions as to whether these circumstances constitute an abuse of discretion. The Supreme Court, The Sixth, and Ninth Circuits.

There are compelling reasons for this Court to resolve the confusion and conflict over the proper standard of judicial review a Court must follow when a conflicted claim Administrator's decision to terminate benefits is not based on the quality and quantity of medical evidence, and opinions on both sides. (T-19-48, 51-52, 120, 130) & (App. C, pg. 36-43) v. (App. D, pg. 41)

The Supreme Court concluded that this conduct was so egregious that it was an abuse of discretion even if there were no conflict at all. *Metlife v. Glenn*, 128 S.Ct. 2343(2008) (T-19-48), (T-100-104)

Metlife v. Glenn, 128 S.Ct. 2343(2008), and The Ninth Circuit, in *Newcomb v. Standard Ins. Co.*, 187 F.3d.1004, 1006, 23 EBC 2045 (9th Cir. 1999).

Prior to the Appeal Court's review denial, Everson sought a fair review of the claims administrator's decision to terminate her benefits, and ask this Court to consider a remedy which permits review of this case, rescinds the wrongful termination of her benefits, and directs Liberty to reinstate retroactively the benefits." Metlife v. Glenn, (citing Schneider v. Sentry Group Long Term Disability Plan, 422 F.3d 621 (7th Cir.2005)

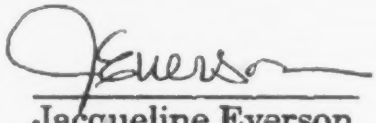
CONCLUSION

The ruling set in this ERISA claim takes away any chance for future ERISA disability victims to receive justice. The judgment in this case permits the Circuits at its discretion to set aside the Supreme Court's recent ruling, and instead rely on a ruling twenty-five years old (1984). The Eleventh Circuit bolstered the opinion of Dr. D'Auria after finding him to be belied, and unreliable as a matter of law. The Eleventh Circuit sets aside the progress made in the recent Supreme Court ruling and contravenes Congress' intentions. The ruling also conflicts with at least two established laws, and two Circuits. This ruling is sure to cause confusion in future cases, and warrants immediate action of the United States Supreme Court to restore the quality standards required to evaluate the conflicted claim

administrator's decision to terminate benefits in an ERISA claim.

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court grant this Petition For Writ Of Certiorari, and reverse the judgment.

Respectfully submitted, This 4th Day of June 2009



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-10549-H

JACQUELINE EVERSON,

Plaintiff-Appellant

v.

LIBERTY MUTUAL ASSURANCE COMPANY,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Georgia

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Date of Entry: March 19, 2009

Before: Tjoflat, Dubina, and Black, Circuit Judges.

BY THE COURT

This appeal is DISMISSED, sua sponte, for lack of jurisdiction. Jacqueline Everson's February 3, 2009, notice of appeal, is untimely to appeal the district court's February 2, 2009, final judgment. See Fed.R.App.P. 4(a)(1)(A); Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001).

No motion for reconsideration may be filed unless it complies with the timing and other requirements of 11th Cir.R. 40-4 and all other applicable rules.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-10549-HH

JACQUELINE EVERSON,

Plaintiff-Appellant

v.

LIBERTY MUTUAL ASSURANCE COMPANY,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Georgia

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Date of Entry: April 21, 2009

Before: Tjoflat, Dubina, and Black, Circuit Judges.

BY THE COURT

Jacqueline Everson's March 24, 2009, motion for reconsideration of our March 19, 2009, order dismissing this appeal for lack of jurisdiction, is DENIED. We also note that our March 19, 2009, order incorrectly states that the district court's final judgment was entered on February 2, 2009. The

APPENDIX B

The district court's final judgment was actually entered on January 2, 2009. This clerical error does not affect the disposition of this appeal.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

No. 1:05-CV-2459-RWS

JACQUELINE EVERSON,

Plaintiff

v.

LIBERTY MUTUAL ASSURANCE COMPANY,

Defendant

ORDER

Date of Entry: November 2, 2006

Before: RICHARD W. STORY, District Judge.

Plaintiff Jacqueline Everson, proceeding *pro se*, initiated this action on September 21, 2005 against Defendant Liberty Mutual Assurance Company ("Liberty") alleging wrongful termination of her disability benefits under the Employment Retirement Income Security Act of 1974 ("ERISA"), see 29 U.S.C. § 1002(1), and several claims under state law. (See Pl.'s Original Compaint [1-1] [hereinafter "Compl."]) In an order dated October 10 this

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Court dismissed Plaintiff's state law claims. [1] (See Order of Oct. 10, 2006 [35] At 1-4)

Both parties have moved for summary judgment on Plaintiff's remaining ERISA claims. (See Pl.'s Mot. for Summ. J. [15]; Def.'s Cross Mot. For Summ. J [17].) Defendant has also moved to strike Plaintiff's [Second] Response to Defendant's Cross Motion for Summary Judgment. (See Def.'s Mot. To Strike [31] at 1.) The Court now takes up these motions.

Background

I. The Policy

Plaintiff is a former employee of The Coca-Cola Company. At the times relevant to this action, Liberty was under a contract with Coca-Cola to provide group long-term disability income insurance to Coca-Cola's covered employees. (See Ex. A to Def.'s Mot. to Partially Dismiss [3-3] [hereinafter "the Plain" or "the Policy"].) Under the Plan, "Disabled" is defined as a condition in which "the Covered Person, as a result of Injury or Sickness, is unable to perform the Material and Substantial Duties of his Own Occupation;

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[1] The procedural posture of this case is fully reported in this Court's order of October 10, 2006. (See Order of October 10, 2006 [35] at 1-4.]

and [two years] thereafter, the Covered Person is unable to perform, with reasonable continuity, the Material and Substantial Duties of Any Occupation." Because Plaintiff's disability benefits were terminated less than two years after they were commenced, the parties agree that Plaintiff's disability is measured by her ability to perform the material duties of her "own occupation," not "any occupation."

The Plan also defines "Injury" as "bodily impairment resulting directly from an accident and independently of all other causes," and defines "Sickness" as "illness, disease, pregnancy or complications of pregnancy."[2] The Plan further provides that "Liberty shall possess the authority, in its sole discretion, to construe the terms of this policy and to determine benefits eligibility hereunder."

II. Plaintiff's Claim and the Cessation of Benefits

A. Plaintiff's February 2004 Claim is Approved

On February 10, 2004, Plaintiff filed a claim for long-term disability benefits with Liberty, stating that she had become disabled due to problems

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[2] The parties do not dispute that Plaintiff's health condition is an "Injury" within the meaning of the Policy, and thus, it is not the fact of injury, but the extent of injury, that is in dispute in this case.

with her back, neck, and upper extremities; had been unable to work since August 29, 2003; and had exhausted her short-term disability benefits.[3] In support of her claim, Plaintiff produced her medical records, including an Attending Physician Statement of her treating physician, Dr. Steven Stewart, and the reports of several other doctors with whom she had visited prior to filing her claim.

In the Attending Physician Statement, Dr. Stewart diagnosed Plaintiff with carpal tunnel syndrome and cervical radiculopathy, a pathological condition of the nerve roots in the spine that causes pain in one's back, neck, and upper extremities. Dr. Stewart stated that Plaintiff "will likely remain in pain for a prolonged period," but estimated that Plaintiff would be able to return to work within three to six months. (See Ex. C to Def.'s Mot. For Summ. J. [filed under seal] [hereinafter "Def.'s Ex. C] at 345.)

Plaintiff's submission to Liberty also included the reports of other doctors that Plaintiff had visited in the seven months prior to her claim for disability benefits. On July 11 and August 1, 2003, some time before Plaintiff

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[3] The Plaintiff's exhaustion of short-term disability benefits was a prerequisite to her eligibility for long-term disability.

took short-term disability leave from work, and six months before she filed for long-term disability leave, Plaintiff visited Dr. Jon Hyman, an orthopedic surgeon at Resurgens Orthopaedics clinic. Dr. Hyman initially diagnosed lateral epicondylitis of the left elbow and cervical strain. He also noted that Plaintiff's overall condition was "getting worse," and suggested that Plaintiff work with restrictions, including limited heavy gripping, limited repetitive gripping, twisting or squeezing, and limited rapid repetitive hand/wrist movement. (See Def.'s Ex. C at 260.) Plaintiff returned to the Resurgens Orthopaedics clinic and visited Dr. Anita Cone-Sullivan on August 11, August 29, September 11, and September 18. On September 18, after Plaintiff had taken short-term disability leave from work because of the pain she was experiencing, Dr. Sullivan reported that Plaintiff should remain on leave for two months, but "[a]nticipate[d] reassessing this in the future and possibly returning her to work at least with restrictions" prior to the end of the two-month period. (Def.'s Ex. C at 249.) Dr. Sullivan also recommended a series of epidural steroid injections. (Id.)

On November 6, 2003, Plaintiff was examined by an orthopedist, Dr. Howard Levy, who reviewed an MRI of Plaintiff's spinal cord and diagnosed

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Cervical radiculopathy. Dr. Levy recommended that Plaintiff visit a surgeon. (Id. at 292.)

On January 22, 2004, at Dr. Levy's behest, Plaintiff visited Dr. John G. Heller, an orthopedic surgeon. In his report, Dr. Heller stated that Plaintiff's "physical examination was quite difficult to sort out" in part because "variable effort was manifested grading the motor groups in the upper extremities." (Id. at 286.) Dr. Heller also noted that the MRI scan was of poor quality, and he had difficulty drawing specific conclusions about the condition of Plaintiff's spinal cord. He also expressed reservations about the source of Plaintiff's symptoms, noting that "absent[] specific, identifiable compression of either her spinal cord or nerve root, I would have a hard time explaining this collection of symptoms and this level of dysfunction based upon a cervical spine injury."[4] (Id.)

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[4] Dr. Heller also stated:

> A salient feature of the past medical history was the fact that she had a prodrome 1 to 2 years of episodic neck stiffness and aching preceding what she alleged was a work-related exacerbation in July of 2003. She did not describe a particular inciting event, but verily and awareness of increasing pain and stiffness in her neck. She and her husband went on a [sic] great length to assign responsibility for this to excessive hours of overtime at her desk job.

(Def. Ex. C at 285.)

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However, Dr. Heller recommended a cervical myelogram test and a CT scan to be performed on Plaintiff. (Id.)

In addition to Plaintiff's medical reports, Liberty received a Physical Job Evaluation Form from Coca-Cola describing Plaintiff's occupational duties. (See id. at 339.) The report stated that Plaintiff's occupational duties required seven to eight hours of sitting, zero to one hour of standing, four to six hours of reaching while working at a computer, repetitive movements on a keyboard, and four to six hours of fine finger dexterity. (Id.) A typewritten document attached to the report listed four primary areas of duties and responsibilities of Plaintiff's occupation. These included:

1) Corporate Financial Reporting
   - updates monthly SAP rolling estimate detail
   - calculates rolling estimate adjustments as directed by Manager
   - updates annual SAP budget detail
   - updates consolidated (field and SAP) TMG reporting spreadsheet with actual and rolling estimate details
   - performs ad hoc reporting and analysis as requested
2) SAP Systems and Process
   - provides general system support to TMG SAP users
   - runs ad hoc reports and performs general as requested

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- reviews monthly actual transaction detail for errors and irregularities.
- provide ad hoc support for SAP workflow and approval processes
- process transactions and coordinate SAP capital processes
- set up and maintain capital and other projects as requested
- assists with chart of authority and other system general updates as required

3) Partner Brands Reporting
   - performs routine and ad hoc operating expense analysis
   - performs ad hoc requests on outlet volume reporting
   - research transactional and accounting detail issues as requested
4) Partner Brands Reimbursements
   - process semi-annual disbursements for Partner brands for Fountain, Dasani, Minute Maid and Bottle/Can (CTM)
   - problem-solve reimbursement related volume reporting and outlet issues
   - develop and maintain detail documentation to support reimbursements
   - update and maintain plan and rolling estimate information in the CTM system (Id. at 341.)

Liberty also requested a Physical Capacities report from Dr. Stewart, but had not received it at the time it made its decision on Plaintiff's claim.

On April 14, 2004, based on the above-described medical reports, Dr. Stewart's Attending Physician

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Statement indicating his opinion that Plaintiff was fully disabled, and the Physical Job Evaluation Form, Liberty determined Plaintiff was "disabled" within the meaning of the Plan and approved Plaintiff's claim for disability benefits, retroactively applying her benefits to March 5, 2004, the day after her short-term benefits ended. (Id. at 301.)

B. Liberty Reevaluates Plaintiff's File

On April 15, 2004, a day after Liberty granted Plaintiff's request for benefits, Dr. Stewart responded to Liberty's earlier request for a Physical Capacities Form. In the form, Dr. Stewart stated that, "[d]ue to patients severe chronic pain this patient is 100% disabled." (Id. at 298.) Dr. Stewart also stated, however, that Plaintiff could sit for four hours with hourly breaks, stand for two hours with hourly breaks, walk for two hours with 30-minute breaks, and reach below shoulder level for one hour daily. (Id.)

In October 2004, Liberty reviewed Plaintiff's medical records to determine Plaintiff's continuing eligibility. Susan McCormack, a Liberty nurse, filed a notation stating that it appeared from Plaintiff's medical records that Plaintiff's condition was improving and she was capable of some work. She also noted that it did not appear that Plaintiff had acted upon the recommendations of her doctors. Nurse McCormack observed, for example, that "[t]here is no evidence that [Plaintiff]] had the CT myelogram as recommended by Dr. Heller, ...no evidence any additional diagnostic testing

was obtained[, and n]o evidence of epidural steroid [injection] or additional [physical therapy]." Ms. McCormack concluded that a "[p]otential for increased activity is present." (Id. at 20-21.)

On November 18, Plaintiff had an electromyographic/nerve conduction ("EMG/NCS") study performed by Dr. Jacquelyn Washington. Based on the results of the test, Dr. Washington concluded that Plaintiff had "severe" bilateral cervical radiculopathy. In her report, Dr. Washington noted that the electromyography "was remarkable for evidence of spontaneous activity and chronic denervation/reinnervation noted in the left deltoid, biceps, and infraspinatus. Spontaneous activity was seen in upper and middle cervical paraspinal muscles bilaterally." (Pl.'s Ex. A at 268.) While not opining on Plaintiff's capacity to work, Dr. Washington concluded that "[t]his is an abnormal study... The findings are severe[,] and consistent with both ongoing active as well as chronic denervation. Diagnostic considerations include cervical spondylosis and multilevel disc disease." (Id.)

On December 21, Dr. Washington again met with Plaintiff, and reported that "the patient continues to be symptomatic with evidence of upper motor neuron and lower motor neuron weakness." (Id. at 279.) Dr. Washington

concluded, in a letter sent to Dr. Stewart (Plaintiff's original treating physician) that "[s]urgical consultation is likely to be required," but "[c]ontinue conservative management until then..." (Id.)

C. Independent Medical Examination and Termination of Benefits

In November 2004, during the time that Plaintiff visited Dr. Washington and had the EMG/NCS study performed, Liberty requested that plaintiff attend an "independent medical evaluation" ("IME"). Plaintiff agreed, and on December 13, 2004, Plaintiff was examined by Dr. Ralph D'Auria, an orthopedic surgeon hired by Liberty. According to Plaintiff's undisputed statements, Dr. D'Auria spent approximately fifteen minutes examining Plaintiff. Dr. D'Auria also reviewed Plaintiff's medical records, including the reports of Plaintiff's prior visitations to the doctors discussed above, the results of the 9/10/03 cervical MRI scan, and Dr. Stewart's Physical Capacities Form. According to his report, Dr. D'Auria also reviewed the results of the EMG/NCS study conducted by Dr. Washington in preparing his initial report, although no mention was made of the EMG/NCS study in the substantive aspects of the initial report.

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In the report, Dr. D'Auria concluded that Plaintiff had "mild cervical radiculopathy, which has been improving over time with the procedures performed and the medical care that she has received. Based on the findings on the physical examination, the radiculopathy is continuing to improve clinically; as indicated by the reflexes, the appearance of the muscles, the muscular strength, and other objective findings." (Id. at 208.) Dr. D'Auria further noted that all of Plaintiff's specialist agreed that Plaintiff's condition was "nonsurgical." But, because "[s]he has received all the necessary treatment for her condition, which has been performed by qualified physicians," there is no specific treatment that would enable Plaintiff to return to "normal functioning." (Id.)

Dr. D'Auria also stated, however, that "claimant should be able to perform her job, which is sedentary in nature, with [restrictions on heavy lifting and overhead pushing and pulling]. Upon returning to work after being inactive for a long period of time, some degree of discomfort and initial mild pain should be expected. However...this should resolve with time." (Id.) He opined that, within 3 to 4 months, Plaintiff "should regain her normal strength

and normal function," and thus the need for restrictions on her ability to work would eventually subside. (Id.)

During his examination of Plaintiff, Dr. D'Auria observed "a significant degree of embellishment of symptoms during the physical examination." Plaintiff "seemed to be more focused on the pain process than on trying to perform in a functional manner. She complained of pain constantly during the examination, even upon light touch, and displayed exaggerated pain behavior throughout. This behavior is very typical of non-physiological overlay that is out of context with the objective findings." (Id. at 210.) He further noted that "[m]any of her limitations appear to be self-imposed due to a fear of performing any movements or any activity. This fear should be alleviated by returning to work in an environment where her attention is not concentrated on pain behavior, but rather on creative and productive activities." (Id. at 210.) In his report, Dr. D'Auria also noted that "[t]he total time spent interviewing and examining the claimant, as well as reviewing her medical records was approximately 2.5 to 3 hours." (Id. at 211.)

On January 11, 2005, Liberty wrote to Dr. Stewart, asking whether he agreed with the findings of Dr. D'Auria, and, if he did not, to explain the

reasons for his disagreement. The letter requested Dr. Stewart's response by February 1, and stated that, in the absence of a response, Liberty would presume that Dr. Stewart was in agreement with Dr. D'Auria.

On February 3, 2005, after not receiving a response from Dr. Stewart, Liberty terminated Plaintiff's disability benefits, "largely based on the IME report." (Def.'s St. of Material Facts [17-2] ¶ 42.)

D. Appeal of Termination

On February 7, 2005, Plaintiff contacted Liberty and stated that she wished to appeal Liberty's decision to terminate her benefits. In a faxed letter, Plaintiff suggested that it did not appear from Dr. D'Auria's analysis that he had considered the results of the EMG/NCS study performed by Dr. Washington or Dr. Stewart's opinion that she was completely disabled. Plaintiff included a letter from Dr. Stewart, dated on the same day, which stated that Plaintiff was "permanently and totally disabled due to chronic, severe neuropathic pain from her cervical spine." (Def.'s Ex. C at 181.)

Liberty forwarded the EMG/NCS report and Dr. Stewart's letter to Dr. D'Auria and asked whether this information affected Dr. D'Auria's conclusions. On February 11, 2005, Dr. D'Auria wrote to Liberty, stating that

he had "concerns" about the EMG/NCS report because it contained no "graphs supporting the assertions issued by Dr. Washington's EMG report." (Id. at 171.) Because such graphs "are usually recorded so that another electromyographer can review the raw data and issue any conclusions based upon objective evidence," and because Dr. D'Auria didn't have the benefit of that raw data, Dr. D'Auria was "unable to issue an opinion regarding the testing without these graphs." (Id.) Dr. D'Auria further stated: "Also, whereas I agree that the patient is somewhat disabled, the extent of the disability is still unknown. A functional capacity evaluation is needed as an objective way to accurately measure her functional abilities and disabilities, since embellishment and magnification of symptoms contaminate any potential positive findings on the physical examination." (Id.) Thus, Dr. D'Auria concluded that "[his] initial impression remains unchanged," but recommended that "a functional capacity evaluation be performed in order to determine the patients true degree of disability." (Id.)

On February 16, Liberty sent Dr. Stewart a letter requesting the raw data underlying Dr. Washington's EMG/NCS report. In the letter, Liberty stated that, "[d]ue to conflicting medical opinion regarding the interpretation of the

study, please send a copy of all relevant raw data for our review, as we are unable to make a determination regarding further benefit eligibility until this is clarified." (Id. at 166.) In a letter dated February 18, Liberty wrote to Plaintiff to let her know that Liberty had "reopened [Plaintiff's] claim until a final determination regarding [her] eligibility is determined, pending review of the raw data from the EMG/NCS results." (Id. at 165.) Plaintiff then was sent a check for the period of February 4 through March 3, 2005.

On February 24, pursuant to Dr. D'Auria's recommendation, Liberty scheduled a functional capacity evaluation to take place, and wrote Plaintiff to this effect. (Id. at 161-62.) On March 4, Plaintiff faxed Liberty a letter, stating her refusal to participate in a functional capacity evaluation. The letter stated as follows:

Since the onset of my disability I have seen eight (8) physicians including; [sic] (7) Specialist, (1) Independent Medical Examiner (IME) requested by Liberty on December 13, 2004, and several Company physicians (Hyman, Cone-Sullivan, Levy, and Heller.)

During the IME you requested, my right to medical privacy was violated, and I was treated harshly. While in my gown and barefoot, I was led to a waiting area with a tile floor. The doors were opened wide on

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A day that was cold enough for a coat (12/13/2004). My medical diagnosis and history was discussed in a waiting area where patients and other staff could hear.

I have complied with all requirements necessary to determine my claim, and the severity of my disability. Therefore, I decline to agree with your request for a second medical examination.

Please do not schedule any additional testing/evaluations. My only request is to be treated fair.

(Id. at 139.)

On March 7, Liberty responded to Plaintiff's March 4, letter, stating that it would suspend Plaintiff's benefits based on its original decision unless Plaintiff attended a functional capacity evaluation. (Id. at 155-56.) Liberty's letter stated:

At this time we are writing to advise you we will reschedule the FCE for you should you reconsider. However, your benefit is suspended pending your attending a rescheduled FCE. If you decide you will not attend a rescheduled FCE, then your claim will be closed based on the original IME results.

We considered the [FCE] testing in the absence of the raw data from the EMG/NCS testing done by

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> Dr. Washington, due to your doctor being in disagreement. However, since your doctor will not provide us with the raw data for review, and you will not attend an FCE, then we will maintain our original decision based on the IME results from Dr. D'Auria.

(Id.) At the close of the letter, Liberty reminded Plaintiff of the language in its disability policy requiring Plaintiff to be "examined or evaluated at reasonable intervals deemed necessary by Liberty...as often as reasonably required." (Id.)

Sometime thereafter, Dr. Stewart sent Liberty the raw data of the EMG performed by Dr. Washington. On March 18, Dr. D'Auria reviewed the raw data of the EMG report and took issue with Dr. Washington's findings and the sufficiency of the report. (Id. at 124.) In his report, Dr. D'Auria requested further clarification of the "evidence of spontaneous [muscle] activity" by Dr. Washington, and noted that "the report does not indicate the basis for the findings of denervation/reinnervation." (Id.) Dr. D'Auria further stated that, in the absence of this data, he was "not able to correlate the findings obtained on my physical examination with [the conclusions of Dr. Washington]...especially with no details regarding the actual findings; no descriptions of the behavior of the muscles under voluntary contraction, minimal contraction, and maximum contraction; and no indication of the type of spontaneous activity."

(Id.) Therefore, he concluded that his "original recommendations remain unchanged [because this] additional evidence does not support an inability of Ms. Everson to perform full time sedentary activities." (Id.)

After receiving this report, Liberty wrote to Dr. Washington on March 23, in an effort to seek more detail about the basis of her findings. In the letter, Liberty repeated the requests of Dr. D'Auria for details as to the specific muscle activity that Dr. Washington found. Thereafter, Dr. Washington returned Liberty's letter, and in a handwritten note in the margin, stated: "description of muscles is on the original report." (Id. at 123.) On March 25, Dr. D'Auria completed another report in which he concluded that Dr. Washington's note "does not provide any additional medical information...[and] does not support the inability of the claimant to perform full time sedentary duties." (Id. at 119.)

On March 29, Liberty wrote to Plaintiff, stating that it had decided to uphold its original decision suspending Plaintiff's benefits and notifying her that she had another opportunity to appeal. (Id. at 97.) On April 1, Plaintiff phoned Liberty to request an appeal. (Id. at 97.) Liberty rejected her appeal on April 8, 2005, but stated that it would retroactively extend her benefits through

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March 29, 2005, the date when Liberty appeared to make its final decision regarding Plaintiff's eligibility.[5] This action followed.

Discussion

I. Preliminary Matters

As an initial matter, the Court takes up Defendant's Motion to Strike [31], which requests that this Court strike Plaintiff's "Response to Defendant's Cross-Motion for Summary Judgment" [29-1] and the attached Affidavit of Caroline Cook [29-2]. In support of its Motion, Liberty argues that Plaintiff did not seek leave of this Court to file a supplemental brief as required by Local Rule 56.1. Liberty also argues that the materials were not within the administrative record considered by Liberty in terminating Plaintiff's benefits. The Court agrees with Liberty's first contention.

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[5] Liberty also notified Plaintiff that she had exhausted her administrative remedies. Approximately 4 months later, on July 25, 2005, Dr. Stewart again wrote to Liberty, stating that Plaintiff's "condition has progressively deteriorated since 2003 to the point where she has been rendered totally disabled... Due to the severity of her condition I have not released Mrs. Everson to return to work since her disability onset in 2003." (Pl.'s Ex. B to Mot. For Summ. J. [15-3] at 331.) Dr. Stewart also attached the reports of Dr. David Gower and Jacqueline Washington. However,

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For ease of reference, the Court describes the procedural posture of this Motion. On March 22, 2006, Plaintiff filed a Motion for Summary Judgment [15]. Liberty responded to Plaintiff's Motion and filed a Cross-Motion for Summary Judgment [17, 21] on April 14. On May 2, Plaintiff filed her first "Response in Opposition to Defendant's Cross Motion for Summary Judgment" [23]. On May 19, Liberty filed its Reply Brief in Support of its Motion for Summary Judgment [27]. On May 29, Plaintiff filed her second "Response to Defendant's Cross Motion for Summary Judgment" [29], to which she attached an Affidavit of Caroline Cook. Defendant then moved to strike Plaintiff's last filing.

As stated, Defendant argues that Plaintiff's motion is improperly before this Court because Plaintiff did not seek leave to supplement her first Response. Local Rule 56.1A provides:

> Motions for summary judgment shall be filed in accordance with the provisions of Fed. R.

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because these reports were sent after Plaintiff had exhausted her appeal with Liberty, they were not part of the administrative record considered by Liberty in evaluating her eligibility, and thus are not considered by this Court. See Parness v. Metro. Life Ins. Co., 291 F. Supp. 2d 1347, 1356-57 (S.D. Fla. 2003). Civ. P. 56, except that no date for a hearing shall be set until after the party opposing the motion has had twenty (20) days after service of

> the motion in which to file a responsive pleading In accordance with LR 7.1C, *the parties shall not be permitted to file supplemental briefs and materials, with the exception of a reply by the movant, except upon order of the court.*

LR 56.1A, NDGa (emphasis added)

In addition, Local Rule 7.1C prescribes the manner in which a party may as a matter of right file a "Reply" to a motion for summary judgment. That rule provides:

> A reply by the movant shall be permitted, but it is not necessary for the movant to file a reply as routine practice. When the movant deems it necessary to file a reply brief, *the reply must be served not later than ten (10) days after service of the responsive pleading.*

LR 7.1C, NDGa (emphasis added)

Although Plaintiff styled the motion at issue a "Response in Opposition to Defendant's Cross Motion for Summary Judgment," Plaintiff already filed her "response" to Defendant's Cross Motion for Summary Judgment on May 2. (See Pl.'s Resp. to Def.'s Cross-Mot. For Summ. J. [23].) Plaintiff did not, however, file a "reply" as was permitted (but not mandated) under Rule 7.1. Therefore, while Plaintiff's subsequent pleading cannot be considered as a "response" because she already filed a response, it may be construed as either a "reply" (in support of her Motion for Summary Judgment), or as a supplemental brief; *i.e.*, a surreply, to her original Response to Defendant's Cross-Motion for

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Summary Judgment. In either case, however, Plaintiff's motion is barred by the Local Rules of this Court.

If construed as a reply brief, Plaintiff's motion was untimely. Under Local Rule 7.1C, Plaintiff had ten days from the filing of Defendant's response to file a reply. Liberty filed its Response to Plaintiff's Motion for Summary Judgment on April 14. Thus, excluding weekends and holidays, the deadline for filing a reply under Rule 7.1C was April 28, 2006. Plaintiff filed the challenged motion on May 22.
Accordingly, insofar as Plaintiff's brief is construed as a reply brief, it was untimely.

If construed as a surreply, the same result obtains, as Plaintiff failed to seek leave of this Court as required by Local Rule 56.1. As stated, Local Rule 56.1A provides that "parties shall not be permitted to file supplemental briefs and materials...*except upon order of the court*." LR 56.1A, NDGa (emphasis added). Having failed to seek leave to file her Response and attachments, the Court concludes that, insofar as it is considered a surreply, Plaintiff's Response and attachments were improper under the Local Rules.[6]

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[6] The Court notes that ten days prior to filing the brief at issue here, Plaintiff unsuccessfully moved for default judgment on the ground that Defendant's response to Plaintiff's motion for summary judgment was untimely. (See Pl.'s Mot. For Default J.

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Accordingly, Liberty's Motion to Strike [31] is GRANTED.

II. Cross Motion for Summary Judgment

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 requires that summary judgment be granted "If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV.P.56(c). "The moving party bears 'the initial responsibility of informing the...court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Hickson Corp. V. N. Crossarm Co., 357 F.3d 1256, 1259 (11th Cir. 2004) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed.

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[26].) Thus, while the Court is mindful that Plaintiff is proceeding *pro se*, it cannot excuse Plaintiff from complying with the same rules of which she has sought enforcement against her opposition.

Furthermore, in light of the Court's conclusion that a dispute of fact exists as to Plaintiff's claims, and in light of the fact that Plaintiff raises virtually the same arguments in her second "Response" as she did in her briefs that are properly before this Court, it is doubtful that, were the Court to consider

2d 265 (1986) (internal quotations omitted)). Where the moving party makes such a showing, the burden shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The applicable substantive law identifies which facts are material. Id. at 248. A fact is not material if a dispute over that fact will not affect the outcome of the suit under the governing law. Id. An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the non-moving party. Id. at 249-50.

In resolving a motion for summary judgment, the court must view all evidence and draw all reasonable inferences in the light most favorable to the non-moving party. Patton v. Triad Guar. Ins. Corp., 277 F.3d 1294, 1296 (11th Cir. 2002). But, the court is bound only to draw those inferences which are reasonable. "Where the record taken as a whole could not lead a rational trier of fact to find for the non—moving party, there is no genuine issue for trial." Allen v. Tyson Foods, Inc. 121 F.3d 642, 646 (11th Cir. 1997) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.

Plaintiff's supplemental materials, its disposition of the parties' motion for summary judgment would be different.

Ct. 1348, 89 L. Ed. 2d 538 (1986)). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (internal citations omitted) see also Matsushita, 475 U.S. at 586 (once the moving party has met its burden under Rule 56(c), the nonmoving party "must do more than simply show there is some metaphysical doubt as to the material facts").

With these standards as a foundation, the Court turns to address the merits of the parties' motion for summary judgment.

B. Cross Motion for Summary Judgment

Plaintiff claims that Liberty violated § 502(a)(1)(B) of ERISA by denying her benefits to which she is entitled under the Policy. Both parties have moved for summary judgment on Plaintiff's claims. For the reasons that follow, the Court concludes that neither party is entitled to summary judgment.

1. Analytical Framework

ERISA itself is silent regarding the standard of review applicable to an administrator's benefits determination. The Eleventh Circuit, however, has articulated three levels of scrutiny that may apply when such a determination is challenged:

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> (1) *de novo* where the plan does not grant the administrator discretion; (2) arbitrary and capricious when the plan grants the administrator discretion; and (3) heightened arbitrary and capricious where there is a conflict of interest.

See Buckley v. Metro. Life, 115 F.3d 936, 939 (11th Cir. 1997); Wagenstein v. Equifax, Inc., 2006 WL 2220822 at *5 (11th Cir. Aug. 4, 2006).

In the present case, the parties agree that Liberty, at the time it terminated Plaintiff's benefits, was both vested with discretion under the Plan and suffered from a conflict-of-interest. Consequently, Liberty's challenged benefits determination is subject to this last, "heightened" arbitrary and capricious level of review. Brown v. Blue Cross & Blue Shield of Ala., Inc., 898 F.2d 1556, 1566-67 (11th Cir. 1990). The standard involves a tripartite inquiry. See Shahpazian v. Reliance Standard Life Ins. Co., 388 F. Supp. 2d 1368, 1373 n.7 (N.D. Ga. 2005) ("Where, as here, the parties agree that the administrator both possessed discretion in denying benefits and suffered from a conflict of interest, an abbreviated three-step analysis is appropriate.").

First, from a *de novo* perspective, the Court must ascertain whether the decision to deny benefits was "wrong"- that is, whether the Court disagrees with it. Williams v. BellSouth Telecomms., Inc., 373 F.3d 1132, 1138 (11th

Cir. 2004). "Wrong' is the label used by our precedent to describe the conclusion a court reaches when, after reviewing the plan documents and disputed terms *de nova,* the court disagrees with the claims administrator's plan interpretation.'" HCA Health Servs. Of Ga., Inc. v. Employers Health Ins. Co., 240 F.3d 982, 993 n.2 (11th Cir. 2001). If it is not "wrong," then the defendant prevails. Id.

In the event that the Court disagrees with the defendant's decision, however, it next looks to whether the challenged decision was "reasonable." Id. A decision is "reasonable" when "there was a reasonable basis for the decision, based upon the facts as known to the administrator at the time the decision was made." See Jett v. Blue Cross & Blue Shield of Ala., Inc., 890 F.2d 1137, 1139 (11th Cir. 1989). Should the defendant's decision prove both wrong and not reasonable, then the claimant is entitled to prevail. Williams, 373 F.3d at 1138.

A third and more difficult question arises where the defendant's decision to deny is wrong but, nevertheless, reasonable. Were the decision subjected only to "ordinary" arbitrary and capricious review – *i.e.,* that applied in circumstances where a defendant is vested with discretion to interpret the plan but does *not* suffer from a conflict-of-interest – it would be entitled to

deference, and the defendant would not be held liable. Id. Under the heightened arbitrary and capricious standard, however, more is required before the defendant may avoid liability. Id. the burden shifts to the defendant to show that its interpretation of the plan was not tainted by self-interest. HCA 240 F.3d at 994.

This Court recently addressed its understanding of what such a showing entails in Wise v. Hartford Life & Accident Ins. Co., 360 F. Supp. 2d 1310 (N.D. Ga. 2005). There, the Court stated:

> [A] conflicted plan administrator may carry its burden in a suit challenging a "wrong but reasonable" factual determination if it can demonstrate that the opinions and evidence it relied on denying the plaintiff's claim were, viewed both from a qualitative and quantitative perspective, at least as objectively reliable as the countervailing opinions and evidence then before it. By demonstrating that it chose to follow what it reasonably perceived as equally or more objectively reliable data, the insurer substantially ameliorates any fears that its decision was motivated by self-interest rather than by a good faith effort to exercise its discretion to interpret and apply the plan. Should the administrator meet this burden, the plaintiff can then prevail only if he demonstrates that the decision was arbitrary and capricious by "other measures."

Wise, 360 F. Supp. 2d at 1323. It acknowledged,

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Moreover, that there may be circumstances in which an ERISA defendant could obtain summary judgment at this stage of the inquiry, even were it not able to demonstrate its decision was not "wrong" as a matter of law. Id. at 1323-24; cf. Barchus v. Hartford Life & Accident Ins. Co., 320 F. Supp. 2d 1266, 1290 (M.D. Fla. 2004) (granting summary judgment to administrator under heightened arbitrary and capricious review, notwithstanding assumption that the administrator's decision was "wrong" and conclusion that the decision was "reasonable"). That is while conflicting medical opinions would preclude summary judgment on the basis that the challenged decision was "correct," an ERISA defendant might still be able to show, as a matter of law, that the predicates for its decision to deny benefits were equally as reliable, from an objective perspective, as those which supported the participant's claim.

2. Neither Party is Entitled to Summary Judgment

a. The initial Inquiries in the "Heightened" Arbitrary and Capricious Review

As stated, the first step in reviewing a denial of ERISA benefits is to determine whether the decision of the benefits administrator was wrong. Applying this standard, the Court cannot hold, as a matter of law, that Liberty's

decision was not "wrong" from the perspective of *de nova* review. Conflicting evidence in the administrative record respecting her capacity to return to work, which existed both at the time Liberty denied her benefits and affirmed its decision on appeal, creates a genuine issue in this regard. See. e.g., Shaw v. Conn. Gen. Life. Ins. Co., 353 F.3d 1276, 1286-87 (11th Cir. 2003) (in case requiring *de nova* analysis respecting whether insurer's decision was "wrong," held that conflicting opinions of various medical providers precluded summary judgment on ERISA claim); Wise, 360 F. Supp. 2d at 1320-21 (holding likewise).

Conversely, as it relates to the second stage in the analysis, the Court concludes that Liberty has come forward with sufficient evidence demonstrating that there existed *some* "reasonable basis for [its] decision, based upon the facts as known to [it] at the time the decision was made." See Jett, 890 F.2d at 1139. Specifically, Liberty provides three reasons for its termination of Plaintiff's benefits and its denial of Plaintiff's appeal.

First, the independent medical evaluation of Dr. D'Auria at least ostensibly supports the reasonableness of the conclusion that Plaintiff was not disabled within the meaning of the Plan. Dr. D'Auria characterized Plaintiff's

condition as "mild" and concluded that her disability did not preclude her from performing "full time sedentary activities." (Def.'s Ex. C at 124.) Although Dr. D'Auria conceded that Plaintiff was "somewhat disabled," he suggested that Plaintiff may have been embellishing the level of her pain in an effort to maintain her eligibility for disability payments.

Second, Dr. Heller's observations in January 2004 – though they were recorded over a year before Liberty terminated Plaintiff's benefits and were apparently considered by Liberty in its initial decision to award Plaintiff benefits – may also lend support to the reasonableness of Liberty's conclusion that Plaintiff was not "disabled." In his report, Dr. Heller noted that he encountered difficulty in analyzing Plaintiff's condition because "variable effort was manifested grading the motor groups in the upper extremities." (Def.'s Ex. C at 286.) He also questioned the medical evidence of Plaintiff's pain, noting that "absent [] specific, identifiable compression of either her spinal cord or nerve root. I would have a hard time explaining this collection of symptoms and this level of dysfunction based upon a cervical spine injury." (Id.) Dr. Heller's observation of Plaintiff's variable efforts and zealousness in her description of the pain she was experiencing is consistent with Dr. D'Auria's observations,

and gives some indication that the severity of Plaintiff's disability was being overstated.

Finally, Defendant also points to Plaintiff's refusal to attend a functional capacity evaluation to bolster the basis for Liberty's decision to terminate her benefits. Plaintiff was obligated under the Plan to provide proof of continuing disability and to honor Liberty's requests to be independently evaluated by other physicians. In this regard, the Plan provided that Liberty could terminate benefits on "the date the Covered Person refuses to be examined or evaluated at reasonable intervals." After being advised by Dr. D'Auria that a functional capacity evaluation would better indicate whether Plaintiff's condition rendered her disabled, Liberty requested that Plaintiff attend such an evaluation. Plaintiff refused to accommodate this request. Although Plaintiff provided as the reason for her refusal the degrading experience of attending the IME with Dr. D'Auria, Liberty may have inferred instead that Plaintiff sought to avoid the evaluation because her condition was improving and her pain was being overstated. Whatever Plaintiff's reasons, the Court concludes that liberty's request for a functional capacity evaluation was not unreasonable. Indeed, the conflicting medical opinions of Dr. Stewart and Dr. D'Auria combined with Dr. D'Auria's

suggestion that Plaintiff attend such an evaluation provided good reason for Liberty to make such a request. In view of Plaintiff's obligation under the Plan, and in view of the conflicting medical evidence, Plaintiff's refusal to participate in the functional capacity evaluation provides, if only to a limited degree,[7] some

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[7] Notably, Liberty does not argue that Plaintiff's refusal to attend a functional capacity evaluation *alone* constituted an independent basis to terminate Plaintiff's benefits. (See Def.'s Br. in Supp. of Mot. for Summ. J [17-3] at 22.) See Porter, 2006 WL 249541 at *1. In Porter the Eleventh Circuit held that a benefits provider had an adequate and independent justification to terminate the plaintiff's disability benefits based on the plaintiff's refusal to submit to an independent medical evaluation. Id. There, the insurer's original decision was based on disputed medical opinions regarding the plaintiff's condition. However, on the Plaintiff's sixth appeal of the provider's decision, the provider offered the Plaintiff the opportunity to submit to an independent medical evaluation. After the Plaintiff refused, the provider denied her appeal, "reasoning that her failure to submit to an independent medical evaluation was a failure to comply with her obligations under the long term plan and establishes a new justification for disability benefits." Id.

Here, like in Porter, Liberty offered Plaintiff an opportunity to participate in an independent evaluation and pointed out in its March 7th letter to Plaintiff that Plaintiff had an obligation to reasonably participate in such evaluations at Liberty's request. (Def.'s Ex. C at 155-56.) Liberty's letter also provided, however, that should Plaintiff choose not to attend a functional capacity evaluation, "your claim will be closed based on the original IME results." (Id.) After noting the disagreement between Drs. Stewart and D'Auria and the need for an independent evaluation, Liberty repeated that it would "maintain [its] original decision based on the IME results from Dr. D'Auria" if

further evidence of justification for Liberty's termination of Plaintiff's benefits. See Porter v. Provident Life and Accident Ins. Co, 2006 WL 249541 (11th Cir. Feb. 2, 2006) (unpublished) (holding that plaintiff's failure to attend independent medical evaluation as required in disability plan constituted an independent ground for termination of plaintiff's benefits and thus summary judgment in favor of defendant was proper).

In sum, the Court concludes that Liberty has come forth with sufficient evidence that its decision to terminate Plaintiff's benefits had some reasonableness basis. Because Liberty's decision was not wrong and unreasonable as a matter of law, Plaintiff is not entitled to judgment as a matter of law. Accordingly, Plaintiff's Motion for Summary Judgment is DENIED.

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[7]Plaintiff refused to submit to the functional capacity evaluation. (Id.)

Because of the specific language of Liberty's letter, this case is arguably distinguishable from Porter. Here, Liberty did not provide as an independent reason for its decision to terminate Plaintiff's benefits Plaintiff's refusal to comply with its request for a functional capacity evaluation. No such reasoning was provided Plaintiff in its letter of March 7, or at any time afterwards. Rather, Liberty stated to Plaintiff that it would "maintain" the reasoning of its "original decision based on the IME results from Dr. D'Auria" should Plaintiff refuse to participate in the functional capacity evaluation. (Id.)

In any event, because Liberty has not raised this issue as an independent basis for termination of Plaintiff's benefits, and because the Court finds that this evidence provides limited value

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b. Comparative Evaluation of the Evidence before Liberty

Having determined that Liberty had some reasonable basis for its decision, but that it nevertheless is not entitled to summary judgment on the grounds that its decision was indisputably "correct," the Court must proceed to the third step in the "heightened" arbitrary and capricious analysis. That is, it must determine whether liberty has met its burden of demonstrating as a matter of law "that the opinions and evidence it relied on denying the plaintiff's claim were, viewed both from a qualitative and quantitative perspective, at least as objectively reliable as the countervailing opinions and evidence then before it." Wise, 360 F. Supp. 2d at 1323. After carefully considering the entirety of the administrative record, and drawing all reasonable inferences in favor of Plaintiff, the Court concludes that a genuine issue remains as to whether Liberty's evidence was more or less reliable than the conflicting evidence in the record.

As an initial matter, the Court observes that Plaintiff's evidence lends support to her claim of disability. Plaintiff's treating doctor, Dr. Stewart- who observed Plaintiff most frequently and over the longest period of time – steadily

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in determining the reliability of the evidence upon which Liberty relied in making its decision, this Court need not decide the difficult issue of whether an insurance provider can offer what appears in this case to be a post hoc independent justification for termination based on a insured's refusal to submit to an

maintained that Plaintiff's condition rendered her "100% disabled."[8] In addition, Dr. Washington's interpretation of the EMG she performed in November 2004, which was offered shortly before Liberty terminated Plaintiff's benefits, bolsters Plaintiff's claim of disability. Dr. Washington concluded that Plaintiff's was an "abnormal study," that Plaintiff's condition was "severe," and the results of the study were "consistent with both ongoing as well as chronic dennervation." Dr. Washington also suggested that Plaintiff may have other debilitating spinal conditions, including cervical spondylosis and multilevel disc disease, and indicated that "surgical consultation is likely to be required." (Def.'s Ex. C at 9.) Defendant, however, apparently rejected this evidence of Plaintiff's disability, and instead relied on the opinion of Dr. D'Auria and the earlier observations of Dr. Heller.

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independent examination. See Grayer v. Liberty Life Assur. Co. of Boston, 144 Fed. Appx. 760,761 n.1 (11th Cir. 2005) (declining to address similar issue and stating that "we do not decide whether district courts are limited to determining whether the reasons proffered by an ERISA plan administrator are the only reasons district courts can consider on appeal").

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[8] Defendant correctly states that "plan administrators are not obliged to accord special deference to the opinions of treating physicians[,]" and that courts may not "impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation." Black & Decker Disability Plan v. Nord, 538 U.S. 822, 825 & 834, 123 S. Ct. 1965, 155 L. Ed. 2d 1034 (2003). However, Drs. Stewart and Washington's status as examining

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After extensively reviewing the opinions in dispute, the Court cannot conclude as a matter of law that Dr. D'Auria's opinion and Dr. Heller's year-old observations were at least as objectively reliable as the opinion of Plaintiff's treating physicians, Drs. Stewart and Washington. Dr. D'Auria's opinion, which virtually stands alone in its minimization of the severity of Plaintiff's condition among the seven doctors with whom Plaintiff visited, is subject to questioning in at least several respects. Indeed, several inconsistencies in Dr. D'Auria's report convince this Court that it cannot be said to be more objectively reliable as a matter of law than the other medical evidence in the record.

First, Dr. D'Auria's initial report indicated that he had considered the results of the EMG/NCS study performed by Dr. Washington in the preparation of his report. After Plaintiff brought to Liberty's attention his failure to address the EMG/NCS study in the substantive aspects of his report, however, Dr. D'Auria then filed an addendum addressing the merits of Dr. Washington's conclusions. In the addendum, Dr. D'Auria stated that he had "concerns" about the EMG/NCS study because it did not have certain graphs attached to it indicating the basis for Dr. Washington's decision. When Dr. Washington

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physicians emphasizes that they had actual contact with Plaintiff, rather than a mere opportunity to examine her on one occasion and review her medical file, which speaks to the reliability of their conclusions. Cf. Godfrey v. BellSouth Telecomms., Inc, 89 F.3d 755, 758-59 (11th Cir. 1996) (observing potential usefulness of in person exam of fibromyalgia patient in ascertaining disability).

responded to Dr. D'Auria's request for additional information by providing the raw data obtained in the study, Dr. D'Auria - in what appears to be his third review of the results of the EMG/NCS-took issue with new aspects of Dr. Washington's observations and conclusions, and requested a description of the specific type of muscle activity Dr. Washington observed in her study. After Dr. Washington responded by noting that the requested information was already included within the report, it appears, that Dr. D'Auria simply dismissed Dr. Washington's conclusions, stating that the test "does not support an inability of Ms. Everson to perform full time sedentary activities." In view of Dr. D'Auria's apparent conclusion that the results of Dr. Washington's EMG/NCS study were reported incompletely, however, it is notable that Dr. D'Auria did not suggest that Plaintiff undergo another EMG/NCS study with the appropriate level of specificity included within the report. Simply put, the Court is not convinced that, when considered in the light most favorable to Plaintiff, the conclusions of Dr. D'Auria were as reliable as those of Dr. Washington, who unlike Dr. D'Auria, performed the study personally, treated Plaintiff directly, and was not tainted by an interest in drawing a desired conclusion or defending a previous (perhaps hastily drawn) conclusion.

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Second, Dr. D'Auria stated in the IME report that his conclusions regarding Plaintiff's lack of disability were bolstered by the fact that all other physicians who had examined Plaintiff had agreed that her condition was nonsurgical. However, in making this statement, it appears that Dr. D'Auria overlooked Dr. Washington's statement that "[s]urgical consultation is likely to be required," and Dr. Washington's apparent recommendation that Plaintiff consider the option of surgery. Thus, in contrast to Dr. D'Auria's apparent understanding, Plaintiff's condition was not uniformly ruled out by the doctors who treated Plaintiff as "nonsurgical"

Third, Dr. D'Auria's conclusion that Plaintiff's cervical radiculopathy was "mild" and "has been improving over time with the procedures performed and the medical care that she has received" is in conflict with virtually all other medical evidence in the record. During the same time period, Dr. Stewart stated that Plaintiff's condition was worsening, and Dr. Washington's observations underscored the severity of Plaintiff's condition. Dr. D'Auria's conclusion that Plaintiff was improving and would "regain her normal strength and normal function" within three to four months is simply belied by virtually all other evidence in the record.

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Other reasons add weight to this Court's conclusion that Dr. D'Auria's conclusions were not as a matter of law at least as objectively reliable as Drs. Washington and Stewart. D'Auria spent a total of two-and-a-half to three hours both examining Plaintiff and examining all of her medical records – a relatively limited examination both in time and scope when considered against the opinions of Plaintiff's treating physicians. Indeed, Liberty has not disputed Plaintiff's contention that Dr. D'Auria spent approximately fifteen minutes examining Plaintiff.[9] Moreover, Dr. D'Auria conceded that Plaintiff was at least partially disabled at the time of termination, and acknowledges that the dispute is only over the "extent of disability." Dr. D'Auria himself recommended that Plaintiff should, at least initially, work with restrictions, and that "some degree of discomfort and initial mild pain should be expected." In light of Liberty's inherent conflict-of-interest, the Court cannot conclude that its reliance on Dr. D'Auria's opinion over that of Drs. Stewart and Washington was objectively reasonable as a matter of law.

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[9] It appears that Dr. D'Auria's medical conclusions were in large part based on his observation that Plaintiff exhibited "a significant degree of embellishment of symptoms during the physical examination." (Def.'s Ex. C at 208.) It is significant, however, that, with the possible exception of Dr. Heller's examination in January 2004, no other doctor has indicated that Plaintiff's feelings of pain have been exaggerated.

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Liberty also relies on the statements by Dr. Heller in January 2004 that Plaintiff had exhibited "variable" effort and his observations that he would "have a hard time explaining [Plaintiff's] symptoms and this level of dysfunction based upon a cervical spine injury." However, these observations were made over one year prior to Liberty's decision. What is more, these observations were considered by Liberty in its initial determination that Plaintiff was "disabled" and entitled to an award of benefits. In light of the fact that Liberty itself apparently did not attach much significance to Dr. Heller's observations during Plaintiff's single visit with him – which occurred just one month prior to Liberty's initial determination that Plaintiff was "disabled" – this evidence cannot be said to be more reliable as a matter of law than the conflicting evidence adduced by Plaintiff.

Finally, Liberty relies on the fact of Plaintiff's refusal to attend a functional capacity evaluation as evidence of Plaintiff's ineligibility for disability payments. However, Liberty made this request after its initial termination of Plaintiff's benefits, during the process of Plaintiff's appeal. As this Court has previously explained, the specific language of Liberty request that Plaintiff undergo a functional capacity evaluation indicated that the

functional capacity evaluation was not necessary to Liberty's evaluation of Plaintiff's eligibility, but rather was an opportunity for Plaintiff to undergo a further examination in the hope that its results would lead Liberty to reconsider its prior determination. In view of the Court's previous conclusion that Liberty's initial decision to terminate Plaintiff's benefits was not premised on more objectively reliable medical evidence than Plaintiff's evidence, and in view of the fact that Liberty did not initially rely on her refusal to undergo the functional capacity evaluation as an independent basis for denying benefits, this final reason provided by Liberty does not convince this Court that Liberty is entitled to judgment as a matter of law.

Accordingly, Liberty's Cross-Motion for Summary Judgment is hereby **DENIED**.

Conclusion

For the foregoing reasons, Plaintiff's Motion for Summary Judgment [15] is hereby **DENIED**. Defendant's Cross Motion for Summary Judgment [17] is hereby **DENIED**. Defendant's Motion to Strike [31] is hereby **GRANTED**.

The parties are hereby **DIRECTED** to confer and propose a pretrial order pursuant to FED.R. CIV.P.16. In view of the Plaintiff's status as a *pro se*

litigant, the Court hereby **DIRECTS** defense counsel to contact Plaintiff and arrange for the preparation and submission of a proposed consolidated pre-trial order. If the parties are unable to agree to a proposed consolidated pre-trial order, the parties shall submit a proposed pre-trial order, on their own behalf. The pre-trial order shall be filed with the Court not later than thirty (30) days from the date of this Order.

SO ORDERED this 2nd day of November, 2006

RICHARD W. STORY
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 1:05-CV-2459-RWS

JACQUELINE EVERSON,

Plaintiff

v.

LIBERTY MUTUAL ASSURANCE COMPANY,

Defendant

FINDINGS OF FACT AND CONCLUSION OF LAW

Date of Entry: January 2, 2009

Before: RICHARD W. STORY, District Judge.

Plaintiff Jacqueline Everson, proceeding pro se, initiated this action on September 21, 2005, against Defendant Liberty Mutual Assurance Company ("Liberty"). In her original Complaint, Plaintiff alleged wrongful termination of her disability benefits under the Employment Retirement Income Security Act of 1974 ("ERISA"), see 29 U.S.C. § 1002(1), and several related claims arising under state law. (See Pl.'s Original Complaint [1-1] [hereinafter "Compl."].) In an Order dated October 10, this Court

dismissed Plaintiff's state law claims, leaving intact only Plaintiff's claim under ERISA. (See Order of October 10, 2006 [35] at 1-4.) By Order dated November 2, 2006 [36], the Court denied both parties' motions for summary judgment.[1]

This case then came before the Court for trial on December 16, 2008. After considering the evidence presented at trial and the arguments of Ms. Everson and defense counsel, the Court enters the following Findings of Fact and Conclusions of Law.

Findings of Fact

I. The Parties

1. Plaintiff Jacqueline Everson is a 50-year –old female and a former employee of The Coca-Cola Company.
2. Defendant Liberty Life Assurance Company of Boston ("Liberty"), sued as "Liberty Mutual Assurance Company," is a company which sells and administers group plans for long-term disability benefits.

II. The Policy

3. At all times relevant to this action, Liberty was under a contract.

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[1] The procedural posture of this case is fully reported in this Court's Order of October 10, 2006 and Order of November 2, 2006.

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Identified as Group Policy No. GF3-850-281390-01 (the "Plan"), with Coca-Cola to provide group long-term disability income insurance to Coca-Cola's covered employees within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(1). (Def. Ex. 1.) At all times relevant to this action, Plaintiff was a covered employee.

4. Under the Plan, "Disabled" is defined as a condition in which in the first two years "the Covered Person, as a result of Injury or Sickness, is unable to perform the Material and Substantial Duties of his Own Occupation; and [two years] thereafter, the Covered Person is unable to perform, with reasonable continuity, the Material and Substantial Duties of Any Occupation." The parties do not dispute that, because the Plaintiff's disability benefits were terminated within two years after they were commenced, the controlling provision in this case respects Plaintiff's ability to perform the material duties of her "Own Occupation," and not "Any Occupation."

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5. The Plan also defines "Injury" as "bodily impairment resulting directly from an accident and independently of all other causes," and defines "Sickness" as "illness, disease, pregnancy or complications of pregnancy."

6. The Plan further provides that "Liberty shall possess the authority, in its sole discretion, to construe the terms of this policy and to determine benefit eligibility hereunder."

7. The Plan also authorized Liberty to require medical examinations or other evaluations as part of its review of a claim for benefits:

> Liberty, at its own expense, may have the right and opportunity to have a Covered Person, whose Injury or Sickness is the basis of a claim, examined or evaluated at reasonable intervals deemed necessary by Liberty. This right may be used as often as reasonably required.

(Def. Ex. 1.)

III. Plaintiff's Occupation

8. Plaintiff became employed by Coca-Cola in 1988 (See Def. Ex. 2, p. 422) In 2003, her job title was Senior Financial Analyst, described as a "desk job" with most of the day spent "working on a

computer, with some time in meetings and on the phone." (Id. at 339.)

9. Liberty received a Physical Job Evaluation Form from Coca-Cola describing Plaintiff's occupational duties. (See id. at 339.) In this report, the manager of Plaintiff's work-group stated that Plaintiff's occupational duties required seven to eight hours of sitting, zero to one hour of standing, four to six hours of reaching while working at a computer, repetitive movements on a keyboard, and four to six hours of fine finger dexterity. (Id.)

IV. Plaintiff's Claim and the Cessation of Benefits

A. Plaintiff's Medical History Prior to Approval of Long-Term Disability Benefits.

10. In early 2003, Plaintiff began experiencing neck, arm, and elbow pain. (Def. Ex. 2, pp. 261-64.)

11. In May and June 2003, plaintiff was seen by Steven Stewart, M.D., a family practice physician, who diagnosed elbow strain. (Id. at 371-72.)

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12. On July 11, 2003, plaintiff was seen by Jon Hyman, M.D., an orthopedic surgeon. (Id. at 261-63.) X-rays of plaintiff's elbow were normal, and Dr. Hyman diagnosed lateral epicondylitis and recommended rest and splinting for two weeks. (Id. at 262.)

13. On August 1, 2003, plaintiff reported increased elbow pain, bilateral shoulder pain, and neck pain. (Id. at 258-60.) Dr. Hyman diagnosed lateral epicondylitis of the elbow and a cervical strain. He also noted that Plaintiff's overall condition was "getting worse," and suggested that Plaintiff work with restrictions, including limited heavy gripping, limited repetitive gripping, twisting or squeezing, and limited rapid repetitive hand/wrist movement. (Id.)

14. On August 11, 2003, plaintiff was seen by Anita Cone-Sullivan, M.D., also an orthopedic surgeon, complaining of neck and upper extremity pain, numbness, tingling, and right arm pain. (Id. at 255-57.)

15. Based on a physical examination and x-rays of plaintiff's cervical spine, Dr. Sullivan diagnosed cervical radiculopathy, cervical

spondylosis, left carpal tunnel syndrome, and left lateral epicondylitis (Id.)

16. On August 29, 2003, when plaintiff complained of neck and bilateral upper extremity pain, Dr. Sullivan recommended that she undergo an electromyogram and nerve conduction study (EMG/NCS) and a cervical MRI. (Id. at 252-54.)

17. After plaintiff "discussed not being able to attend work due to her ...symptoms at this time," Dr. Sullivan placed her off work for two weeks. (Id.)

18. Plaintiff never returned to work for Coca-Cola after that office visit. (Id. at 344-73.)

19. On September 10, 2003, plaintiff had an MRI of the cervical spine, which was described as having "[t]echnically compromised axial gradient echo sequences due to patient motion artifact." (Id. at 359.) Nevertheless, the MRI was interpreted to show a herniated disc at C4-5 on the right, with mild flattening of the cord at that level and impingement of the right C5 nerve root, and an

osteophyte at the C5-6 level, impinging both C6 nerve roots. (Id. at 359-60.)

20. On September 11 and 18, 2003, plaintiff saw Dr. Sullivan, who diagnosed cervical radiculopathy, left elbow lateral epicondylitis, cervical spondylosis, but noted that the electromyogram and nerve conduction studies were normal. (Id. at 250-51, 248-49.) Dr. Sullivan reported that Plaintiff should remain on leave for two months, but "[a]nticipate[d] reassessing this in the future and possibly returning her to work at least with restrictions" prior to the end of the two-month period. (Id. at 249.) Dr. Sullivan also recommended a series of three epidural steroid injections and physical therapy. (Id.)

21. Plaintiff attended physical therapy for approximately four weeks, but discontinued it on the grounds that it exacerbated her symptoms. (Id.) Plaintiff did not obtain the epidural steroid injections.

22. On October 3, 2003, Plaintiff saw Dr. Stewart, complaining of pain and numbness in her neck, arm, and shoulder. (Id. at 355.) Dr.

Stewart recommended that plaintiff see an orthopedist and get an MRI of her elbow. (Id.)

23. Plaintiff continued to see Dr. Stewart approximately once every two months until at least August 2004, although his office notes are largely illegible. (Id. at 238-39, 308-09, 347, 349-50, 355-57.)

24. On October 14, 2003, plaintiff had an MRI of the left elbow, which showed subtle abnormal signal stimulation to the common extensor tendon, and mild lateral epicondylitis. (Id. at 356-57.)

25. On November 6, 2003, plaintiff saw Howard Levy, M.D., of The Emory Spine Center, who diagnosed cervical radiculopathy, and recommended that plaintiff consult a surgeon. (Id. at 291-92.) Dr. Levy noted that plaintiff was scheduled for a surgical consult with John G. Heller, M.D., in January 2004 and that she should remain out of work until then. (Id. at 351.)

26. On January 20, 2004, plaintiff was seen by Dr. Heller, who noted that the MRI in September 2003 was of poor quality and that "[t]he best one can glean is that she has mild multilevel spondylosis in the cervical spine with a fairly spacious cervical

spinal canal." (Id. at 285-87.) Dr. Heller also noted that without specific, identifiable compression of plaintiff's spinal cord or nerve root, he would "have a hard time explaining this collection of symptoms and this level of dysfunction based upon a cervical spine injury." (Id.)

27. Dr. Heller said that the MRI findings were not entirely consistent with his findings on physical examination, and he recommended that plaintiff undergo a cervical myelogram and CT scan to determine whether there was any compression of her spinal cord. (Id.)

B. Plaintiff's February 2004 Claim is Approved

28. On February 10, 2004, Plaintiff filed a claim for long-term disability benefits with Liberty, stating that she had become disabled due to problems with her back, neck, and upper extremities; had been unable to work since August 29, 2003; and had exhausted her short-term disability benefits.[2]

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[2] The Plaintiff's exhaustion of short-term disability benefits was a prerequisite to her eligibility for long-term disability

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29. In support of her claim, Plaintiff produced her medical records, including an Attending Physician Statement of Dr. Stewart, her treating physician, and the reports of the doctors described above. (Id. at 344-73, 423.) Plaintiff reported that she had "reoccurring [sic] neck stiffness"" for which she was first treated on July 11, 2003. (Id. at 423.)

30. In the Attending Physician Statement, dated February 4, 2004, Dr. Stewart reported that plaintiff had been diagnosed with cervical spine radiculopathy and carpal tunnel syndrome. He opined that Plaintiff "will likely remain in pain for a prolonged period," but estimated that Plaintiff would be able to return to work within three to six months. (Id. at 345-46.)

31. In addition to Plaintiff's medical reports, Liberty received the Physical Job Evaluation Form from Coca-Cola describing Plaintiff's occupational duties as full-time sedentary work. (See id. at 339, 330-32.)

32. Liberty also requested a Physical Capacity report from Dr. Stewart, but had not yet received it at the time it made its decision

on Plaintiff's claim.

33. On April 14, 2004, based on the above-described medical reports, Dr. Stewart's Attending Physician Statement, and the Physical Job Evaluation Form, Liberty approved Plaintiff's claim for disability benefits and retroactively applied her benefits to March 5, 2004, the day after her short-term benefits ended. (Id. at 301.)

C. Liberty Reevaluates Plaintiff's File

34. On April 15, 2004, a day after Liberty granted Plaintiff's request for benefits, Dr. Stewart responded to Liberty's request by providing a Physical Capacities Form. In the form, Dr. Stewart stated that, "[d]ue to patients severe chronic pain this patient is 100% disabled." (Id. at 298.) Dr. Stewart also stated, however that Plaintiff could sit for four hours with hourly breaks, stand for two hours with hourly breaks, walk for two hours with 30 minute breaks, and reach below shoulder level for one hour daily. (Id.)

35. On May 12, 2004, Liberty Life's medical consultant concluded that plaintiff's medical records supported her diagnosis of cervical

radiculopathy and that her medical care had been appropriate. (Id. at 281.)

36. In October 2004, Liberty reviewed Plaintiff's medical records to determine Plaintiff's continuing eligibility. Susan McCormack, a Liberty nurse, reviewed Plaintiff's file and noted that her medical records gave certain indications that her condition was improving and she was capable of some work. She also noted that it did not appear that Plaintiff had acted upon the recommendations of her doctors. Nurse McCormack observed, for example, that "[t]here is no evidence that [Plaintiff] had the CT myelogram as recommended by Dr. Heller, ... no evidence any additional diagnostic testing was obtained[, and n]o evidence of epidural steroid [injection] or additional [physical therapy]." Ms. McCormack concluded that a "[p]otential for increased activity is present." (Id. at 20-21.)

37. On November 18, Plaintiff had an electromyographic/nerve conduction ("EMG /NC") study performed by Dr. Jacquelyn Washington. Based on the results of the test, Dr. Washington

concluded, that Plaintiff had "severe" bilateral cervical radiculopathy. (Pl.'s Ex. 17.) In her report, Dr. Washington noted that the electromyography "was remarkable for evidence of spontaneous activity and chronic denervation/reinnervation noted in the left deltoid, biceps, and infraspinatus. (Id.) Spontaneous activity was seen in upper and middle cervical paraspinal muscles bilaterally." (Id.) While not opining on Plaintiff's capacity to work, Dr. Washington concluded that "[t]his is an abnormal study. ...The findings are severe[,] and consistent with both ongoing active as well as chronic denervation. Diagnostic considerations include cervical spondylosis and multilevel disc disease." (Id.)

38. On December 21, Dr. Washington again met with Plaintiff, and reported that "the patient continues to be symptomatic with evidence of upper motor neuron and lower motor neuron weakness." (Id. at 279.) Dr. Washington concluded, in a letter sent to Plaintiff's family physician, Dr. Stewart, that "[s]urgical consultation is likely to be required," but "[c]ontinue conservative management until then..." (Id.)

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D. Independent Medical Examination and Termination of Benefits

39. In November 2004, Liberty requested that Plaintiff attend an "independent medical evaluation" ("IME"). Plaintiff agreed, and on December 13, 2004, Plaintiff was examined by Dr. Ralph D'Auria, an orthopedic surgeon. (Def. Ex. 2 at 205-11.)

40. Dr. D'Auria spent approximately fifteen minutes examining Plaintiff. Dr. D'Auria also reviewed Plaintiff's medical records, including the reports of Plaintiff's prior visitations to the doctors discussed above, the results of the 9/10/03 cervical MRI scan, Dr. Stewart's Physical Capacities Form, and the results of Dr. Washington's EMG/NC study. (Id. at 207-08.)

41. In his report, Dr. D'Auria concluded that Plaintiff had "mild cervical radiculopathy, which has been improving over time with the procedures performed and the medical care that she has received. Based on the findings on the physical examination, the radiculopathy is continuing to improve clinically; as indicated by the reflexes, the appearance of the muscles, the muscular strength, and other objective findings." (Id. at 208.) Dr. D'Auria further

noted that all of Plaintiff's specialists agreed that Plaintiff's condition was "nonsurgical," but that, because "[s]he has received all the necessary treatment for her condition, which has been performed by qualified physicians," there is no specific treatment that would enable Plaintiff to return to normal functioning. (Id.)

41. Dr. D'Auria also stated, however, that "claimant should be able to perform her job, which is sedentary in nature, with [restrictions on heavy lifting and overhead pushing and pulling]. Upon returning to work after being inactive for a long period of time, some degree of discomfort and initial mild pain should be expected. However... this should resolve with time." (Id.) He opined that, within 3 to 4 months, Plaintiff "should regain her normal strength and normal function," and thus the need for restrictions on her ability to work would eventually subside. (Id.)

42. In his report, Dr. D'Auria noted "a significant degree of embellishment of symptoms during the physical examination." Plaintiff "seemed to be more focused on the pain process than on trying to perform in a functional manner. She complained of pain

constantly during the examination, even upon light touch, and displayed exaggerated pain behavior throughout. This behavior is very typical of non-physiological overlay that is out of context with the objective findings." (Id. at 210.) He further noted that "[m]any of her limitations appear to be self-imposed due to fear of performing any movements or any activity. This fear should be alleviated by returning to work in an environment where her attention is not concentrated on pain behavior, but rather on creative and productive activities." (Id. at 210.)

43. In his report, Dr. D'Auria also noted that "[t]he total time spent interviewing and examining the claimant, as well as reviewing her medical records was approximately 2.5 to 3 hours." (Id. at 211.)

44. On January 11, 2005, Liberty wrote to Dr. Stewart, asking whether he agreed with the findings of Dr. D'Auria, and, if he did not, to explain the reasons for his disagreement. The letter requested Dr. Stewart's response by February 1, and stated that, in the absence of a response, Liberty would presume that Dr. Stewart was in agreement with Dr. D'Auria. (Id. at 202-04.)

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45. On February 3, 2005, after not receiving a response from Dr. Stewart, Liberty wrote to Plaintiff informing her of its decision to terminate Plaintiff's disability benefits. Liberty stated that it concluded that Plaintiff was able to perform full-time sedentary work based upon the opinion of Dr. D'Auria and the lack of response from Dr. Stewart. (Id. at 198-200.)

E. Appeal of Termination

46. On February 7, 2005, Plaintiff contacted Liberty and stated that she wished to appeal Liberty's decision to terminate her benefits. In a faxed letter, Plaintiff suggested that it did not appear from Dr. D'Auria's analysis that he had considered the results of the EMG/NC study performed by Dr. Washington or the opinion of Dr. Stewart. Plaintiff included a letter from Dr. Stewart dated the same day, which stated that Plaintiff was "permanently and totally disabled due to chronic, severe, neuropathic pain from her cervical spine." (Id. at 181; Pl. Ex. 8.)

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47. Liberty forwarded the EMG/NC report and Dr. Stewart's letter to Dr. D'Auria and asked whether this information affected Dr. D'Auria's conclusions.

48. On February 11, 2005, Dr. D'Auria wrote to Liberty, stating that he had "concerns" about the EMG report because it contained no "graphs supporting the assertions issued in Dr. Washington's EMG report." (Id. at 171.) Because such graphs "are usually recorded so that another electromyographer can review the raw data and issue any conclusions based upon objective evidence," and because Dr. D'Auria didn't have the benefit of that raw data, Dr. D'Auria was "unable to issue an opinion regarding the testing without these graphs." (Id.)

49. Dr. D'Auria further stated: "Also, whereas I agree that the patient is somewhat disabled, the extent of the disability is still unknown. A functional capacity evaluation is needed as an objective way to accurately measure her functional abilities and disabilities, since embellishment and magnification of symptoms contaminate any potential positive findings on the physical examination." (Id.)

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50. Dr. D'Auria concluded that "[his] initial impression remains unchanged," but recommended that "a functional capacity evaluation be performed in order to determine the patient's true degree of disability." (Id.)

51. On February 16, Liberty sent Dr. Stewart a letter requesting the raw data underlying Dr. Washington's EMG report. In the letter, Liberty stated that, "[d]ue to conflicting medical opinion regarding the interpretation of the study, please send a copy of all relevant raw data for our review, as we are unable to make a determination regarding further benefit eligibility until this is clarified." (Id. at 166.)

52. In a letter dated February 18, Liberty wrote to Plaintiff to let her know that Liberty had "reopened [Plaintiff's] claim until a final determination regarding [her] eligibility is determined, pending review of the raw data from the EMG/NCS results." (Id. at 165.) Plaintiff's benefits were then reinstated, and Plaintiff was sent a check for the period of February 4, through March 3, 2005.

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53. On February 24, pursuant to Dr. D'Auria's recommendation, Liberty scheduled a functional capacity evaluation to take place and wrote Plaintiff to this effect. (Id. at 161-62.)

54. On March 4, Plaintiff faxed Liberty a letter, indicating her refusal to participate in a functional capacity evaluation. The letter stated as follows:

> Since the onset of my disability I have seen eight (8) physicians including; [sic] (7) Specialist, (1) Independent Medical Examination (IME) requested by Liberty on December 13, 2004, and several Company physicians (Hyman, Cone-Sullivan, Levy, and Heller.)
>
> During the IME you requested, my right to medical privacy was violated, and I was treated harshly. While in my gown and barefoot, I was led to a waiting area with a tile floor. The doors were opened wide on a day that was cold enough for a coat (12/13/2004). My medical diagnosis and history was discussed in a waiting area where patients and other staff could hear.
>
> I have complied with all requirements necessary to determine my claim, and the severity of my disability. Therefore,

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> I decline to agree with you request for a second medical examination. Please do not schedule any additional testing/evaluations. My only request is to be treated fair.

(Id. at 139.)

55. On March 7, Liberty responded to Plaintiff's March 4th letter, stating that it would suspend Plaintiff's benefits based on its original decision unless Plaintiff attended a functional capacity evaluation. (Id. at 155-56.) Liberty's letter stated:

> At this time we are writing to advise you we will reschedule the FCE for you should you reconsider. However, your benefit is suspended pending your attending a rescheduled FCE. If you decide you will not attend a rescheduled FCE, then your claim will be closed based on the original IME results.
>
> We considered the [FCE] testing in the absence of the raw data from the EMG/NCS testing done by Dr. Washington, due to your doctor being in disagreement. However, since your doctor will not provide us with the raw data for review, and you will not attend an FCE, then we will maintain our original decision based on the IME results from Dr. D'Auria. (Id.)

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56. At the close of the letter, Liberty reminded Plaintiff of the language in its disability policy requiring Plaintiff to be "examined or evaluated at reasonable intervals deemed necessary by Liberty...as often as reasonably required." (Id.)

57. Sometime thereafter, Dr. Stewart sent Liberty the raw data of the EMG performed by Dr. Washington.

58. On March 18, Dr. D'Auria reviewed the raw data of the EMG report and took issue with Dr. Washington's findings and the sufficiency of the report. (Id. at 124.) In an addendum to his original report, Dr. D'Auria requested further clarification of the "evidence of spontaneous [muscle] activity" by Dr. Washington, and noted that "the report does not indicate the basis for the findings of denervation/reinnervation." (Id.)

59. Dr. D'Auria further stated that, in the absence of this data, he was "not able to correlate the findings obtained on my physical examination with [the conclusions] of Dr. Washington... especially with no details regarding the actual findings; no descriptions of the behavior of the muscles under voluntary

contraction, minimal contraction, and maximum contraction; and no indication of the type of spontaneous activity." (Id.)

60. Therefore, he concluded that his "original recommendations remain unchanged [because this] additional evidence does not support an inability of Ms. Everson to perform full time sedentary activities." (Id.)

61. After receiving this report, Liberty wrote to Dr. Washington on March 23 in an attempt to clarify the basis for her findings. In the letter, Liberty repeated the requests of Dr. D'Auria for details as to the specific muscle activity that Dr. Washington found.

62. Thereafter, Dr. Washington returned Liberty's letter, and in a handwritten note in the margin, stated: "description of muscles is on the original report." (Id. at 123.) On March 25, Dr. D'Auria completed another report in which he concluded that Dr. Washington's note "does not provide any additional medical information... [and] does not support the inability of the claimant to perform full time sedentary duties." (Id. at 119.)

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63. On March 29, Liberty wrote to Plaintiff, stating that it had decided to uphold its original decision suspending Plaintiff's benefits and advising her of her right to appeal. (Id. at 109.)

64. On April 1, Plaintiff phoned Liberty to request an appeal. (Id. at 97.) Liberty rejected her appeal on April 8, 2005, but stated that it would retroactively extend her benefits through March 29, 2005, the date when Liberty appeared to make its final decision regarding Plaintiff's eligibility. [3]

F. Conflict of Interest

65. In the present case, the parties agree that Liberty, at the time it terminated Plaintiff's benefits, was both vested with discretion

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[3] Liberty also notified Plaintiff that she had exhausted her administrative remedies. Approximately 4 months later, on July 25, 2005, Dr. Stewart again wrote to Liberty, stating that Plaintiff's "condition has progressively deteriorated since 2003 to the point where she has been rendered totally disabled... Due to the severity of her condition, I have not released Mrs. Everson to return to work since her disability onset in 2003." (Pl.'s Ex. B to Mot. For Summ. J [15-3] at 331.) Dr. Stewart also attached the reports of Dr. David Gower and Dr. Jacqueline Washington. However, because these reports were sent after Plaintiff had exhausted her appeal with Liberty, they were not part of the administrative record considered by Liberty in evaluating her eligibility, and thus should not be considered by this Court. See Parness v. Metro. Life Ins. Co., 291 F. Supp. 2d 1347, 1356-57 (S.D. Fla. 2003).

under the plan and suffered from a conflict-of-interest because it paid benefits out of its own funds.

66. Liberty's employees who make decisions regarding the claims of ERISA plan participants are paid fixed salaries not based upon the number of claims paid or denied. (Testimony of Charles Johnson.)

67. Liberty does not establish numerical guidelines or quotas regarding claim payments or denials. (Id.)

68. Liberty does not act in a manner to overtly discourage the payment of claims and employs the same procedures for claims that it administers regardless of whether it is paying claims out of its own funds or the funds of another party. (Id.)

69. Plaintiff introduced no evidence outside of the administrative record, such as historical data concerning Liberty's claims denial rate, that would be relevant in determining the weight of the conflict of interest.

Conclusions of Law

I. ERISA Framework

1. Plaintiff's claims arise under section 502 of

the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132 (a)(1)(B).

2. In the present case, the parties agree and the Court finds that Liberty, at the time it terminated Plaintiff's benefits, was both vested with discretion under the plan and suffered from a conflict-of-interest.

3. ERISA is silent regarding the standard of review applicable to an administrator's benefits determination. However, the Eleventh Circuit has recently clarified that an arbitrary-and-capricious standard applies to a challenge of a decision to deny benefits where the claims administrator is vested with discretion. See Doyle v. Liberty Life Assurance Co. of Boston, 542 F.3d 1352, 1360 (11th Cir. 2008).

4. The Eleventh Circuit also clarified that the burden of proof remains at all times with the plaintiff, and the existence of a conflict of interest should merely be considered a factor in the determination of arbitrariness and capriciousness. Id. In Doyle, the court explained as follows:

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> We continue to adhere to [the principle] that reviewing courts must consider an administrator's conflict of interest in deciding whether the decision to deny benefits was arbitrary. But we hold that [Metropolitan Life Ins. v. Glenn, 128 S. Ct. 2343 (2008)] implicitly overrules our precedent to the extent it requires district courts to review benefit determinations by a conflicted administrator under the heightened standard. We hold that the existence of a conflict of interest should merely be a factor for the district court to take into account when determining whether an administrator's decision was arbitrary and capricious. And we hold that, while the reviewing court must take into account an administrative conflict when determining whether an administrator's decision was arbitrary and capricious the burden remains on the plaintiff to show the decision was arbitrary; it is not the defendant's burden to prove its decision was not tainted by self-interest.

Id. at 1360.

5. As a result of the Supreme Court's decision in Glenn and the Eleventh Circuit Court of Appeals' decision in Doyle, this Court's sole inquiry is whether Plaintiff has demonstrated by a preponderance of the evidence that Defendant's decision to deny benefits was arbitrary and capricious.

6. "[A]n abuse of discretion or arbitrary and capricious standard means that the reviewing

court will affirm merely if the administrator's decision is reasonable given the available evidence, even though the reviewing court might not have made the same decision if it had been the original decision-maker."" Callough v. E.I. du Pont de Nemours & Co., 941 F. Supp. 1223, 1228 n.3 (N.D. Ga. 1996); see also Carr v. The Gates Health Plan, 195 F.3d 292, 294 (7th Cir. 1999) ("Under the arbitrary and capricious standard, it is not [the Court's] function to decide whether [it] would reach the same conclusion as the Plan or even rely on the same authority."). As a result, this Court is "limited to determining whether [Liberty Life's decision] was made rationally and in good faith – not whether it was right."" Griffis v. Delta Family-Care Disability, 723 F.2d 822, 825 (11th Cir. 1984)

7. The Court's review of the merits of the administrator's decision is limited to the administrative record. Parness v. Metro. Life Ins. Co., 291 F. Supp. 2d 1347, 1356-57 (S.D. Fla. 2003).

II. Resolution of Plaintiff's Claim

8. After full review and consideration of all the evidence in the administrative record, the Court concludes that Plaintiff has not

demonstrated by a preponderance of the evidence that Liberty's discretionary decision to deny benefits was arbitrary and capricious. Although this Court would not have arrived at the same decision as Liberty, several reasons convince this Court that Liberty's decision that Plaintiff was not "disabled" from performing full-time sedentary work was not unreasonable.

9. First, the independent medical evaluation of orthopedic surgeon Dr. D'Auria, which was based upon a personal visit with Plaintiff and a full review of Plaintiff's medical records, concluded that, at the time the benefits decision was made, Plaintiff was capable of performing full-time sedentary work. The report also observed that Plaintiff may have been embellishing the level of her pain. Although the report's characterization of Plaintiff's injury as "mild" is in conflict with the observations of Dr. Washington and Dr. Stewart, its conclusion is based upon a complete medical analysis of Plaintiff's physical capabilities and pain tolerance. The Court cannot say that it was unreasonable for Liberty to have placed weight on the medical opinion of Dr. D'Auria, a board-

certified orthopedic surgeon, in reaching its conclusion that Plaintiff was not "disabled" under the terms of the Plan.

10. Second, Dr. Heller's observations in January 2004 lend support to both Dr. D'Auria's evaluation and Liberty's conclusion that Plaintiff was not "disabled." In his report, Dr. Heller noted that he encountered difficulty in analyzing Plaintiff's condition because "variable effort was manifested grading the motor groups in the upper extremities." (Def's Ex. 2, p. 286.) He also questioned the physical evidence of Plaintiff's pain, noting that "absent, [sic] specific, identifiable compression of either her spinal cord or nerve root, I would have a hard time explaining this collection of symptoms and this level of dysfunction based upon a cervical spine injury." (Id.) Dr. Heller's observation of Plaintiff's variable effort and the zeal with which she described her pain is consistent with Dr. D'Auria's observations; it also gives reason for a claims administrator to believe that the severity of Plaintiff's pain and inability to work was being overstated.

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11. Third, Plaintiff refused to attend the functional capacity evaluation requested by Liberty. Plaintiff was obligated under the Plan to provide proof of continuing disability and to honor Liberty's requests to be independently evaluated by other physicians. Compare Doyle, 542 F.3d at 1352 ("The burden fell on Doyle to establish that she was entitled to LTD benefits."). In this regard, the Plan provided that Liberty could terminate benefits on "the date the Covered Person refuses to be examined or evaluated at reasonable intervals." Although Plaintiff provided as the reason for her refusal the degrading experience of attending the IME with Dr. D'Auria, it was not unreasonable for Liberty to request such an evaluation and to consider Plaintiff's refusal to attend the functional capacity evaluation in denying her disability benefits. Dr. D'Auria recommended that Plaintiff attend such an evaluation. Moreover, the conflicting medical opinions of Dr. Stewart and Dr. D'Auria and the limited data concerning Plaintiff's functional capacity provided good reason for Liberty to make such a request. In view of Plaintiff's obligation under the Plan, and in view of the

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conflicting medical evidence, Plaintiff's refusal to participate in the functional capacity evaluation provides further evidence that Liberty's termination of Plaintiff's benefits was not unreasonable. Cf. Porter v. Provident Life and Accident Ins. Co., 2006 WL 249541 (11th Cir. Feb. 2, 2006) (unpublished) (holding that plaintiff's failure to attend independent medical evaluation as required in disability plan constituted an independent ground for termination of plaintiff's benefits and thus summary judgment in favor of defendant was proper). [4]

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[4] Notably, Liberty does not argue that Plaintiff's refusal to attend a functional capacity evaluation *alone* constituted an independent basis to terminate Plaintiff's benefits. (See Porter, 2006 WL 249541 at *1. In Porter, the Eleventh Circuit held that a benefits provider had an adequate and independent justification to terminate the plaintiff's disability benefits based on the plaintiff's refusal to submit to an independent medical evaluation. Id. There, the insurer's original decision was based on disputed medical opinions regarding the plaintiff's condition. However, on the plaintiff's sixth appeal of the provider's decision, the provider offered the plaintiff the opportunity to submit to an independent medical evaluation. After the plaintiff refused, the provider denied her appeal, "reasoning that her failure to submit to an independent medical evaluation was a failure to comply with her obligations under the long-term plan and establishes a new justification for disability benefits." Id.

Here, like in Porter, Liberty offered Plaintiff an opportunity to participate in an independent evaluation and pointed out in its March 7th letter to Plaintiff that Plaintiff had an obligation to reasonably participate in such evaluations at Liberty's request. (Def.'s Ex. 2, pp. 155-56.) Liberty's letter also

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12. Fourth, although Plaintiff relies heavily on The conclusion of her family doctor, Dr. Stewart, that she was "disabled" under the meaning of the Plan, the record does not make clear the medical basis for Dr. Stewart's evaluation or the course of treatment pursued by Dr. Stewart. Rather, it appears that in addition to his own evaluations, Dr. Stewart relied upon the subjective reports of pain by Plaintiff and the medical reports of the specialists Plaintiff

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provided, however, that should Plaintiff choose not to attend a functional capacity evaluation, "your claim will be closed based on the original IME results." (Id.) After noting the disagreement between Drs. Stewart and D'Auria and the need for an independent evaluation, Liberty repeated that it would "maintain [its] original decision based on the results from Dr. D'Auria" if Plaintiff refused to submit to the functional capacity evaluation. (Id.)

Because of the specific language of Liberty's letter, this case is arguably distinguishable from Porter. Here, Liberty did not offer Plaintiff's refusal to comply with its request for an independent evaluation as an independent justification for its initial termination of benefits or in its decision on appeal. Indeed, Liberty did not state in its letter of March 7 or any time afterwards that Plaintiff's refusal to participate was the reason (or one of the reasons) underlying Liberty's decision to terminate. Rather, Liberty indicated to Plaintiff that it would "maintain" the reasoning of its "original decision based on the IME results from Dr. D'Auria" should Plaintiff refuse to participate in the functional capacity evaluation. (Id.)

visited in formulating his own opinion of the nature of Plaintiff's disability. But notably, no other specialist opined as did Dr. Stewart that Plaintiff was totally and permanently disabled. In light of the absence of affirmative opinions by other doctors as to Plaintiff's continuing inability to work on a full-time sedentary basis, and in light of the fact that Dr. D'Auria is a board-certified orthopaedic surgeon with more specialized training than Dr. Stewart, Plaintiff's family medicine doctor, the Court cannot say that Liberty's decision to afford Dr. D'Auria's opinion more weight than Dr. Stewart's opinion was unreasonable. See Black & Decker Disability Plan v. Nord, 538 U.S. 822, 825 & 834, 123 S. Ct. 1965, 155 L. Ed. 2d 1034 (2003) (stating that "plan administrators are not obliged to accord special deference to the opinions of treating physicians," and that courts may not "impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation").

Nonetheless, because Liberty has not raised this issue as an independent basis for termination of Plaintiff's benefits, and because the Court finds that this evidence provides limited value in determining the reliability of the evidence upon which Liberty relied in making its decision, this Court need not decide the difficult issue of whether an insurance provider can offer what appears in this case to be a *post hoc* independent justification for termination based on a insured's refusal to submit to an

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13. Fifth, despite the recommendation of Dr. Sullivan to obtain steroid injections and the recommendation of Dr. Heller to obtain a CT scan, it does not appear that Plaintiff pursued these avenues of diagnosis and treatment. Nor did Plaintiff ever attempt to return to work after she started receiving temporary benefits beginning in August 2003. These are additional facts which Liberty may have reasonably considered in its benefits determination. Tippitt v. Reliance Standard Life Ins. Co., 276 F. App'x 912, at *3 (11th Cir. Apr. 29, 2008) (noting that it can be appropriate to consider *post hoc* explanations offered by the insurer about why claim was denied).

14. Finally, Liberty's repeated efforts to obtain more information from Plaintiff's diagnosing physicians after Plaintiff appealed its benefits decision demonstrates that Liberty "took steps to promote accurate claim assessment," and tends to discount the effect of the conflict of interest of which the Court must take account in this action. See Doyle, 542 F.3d at 1362 (suggesting that conflict of interest is of "little significance" where administrator shows that it

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independent examination. See Grayer v. Liberty Life Assur. Co. of Boston, 144 Fed. App'x 760, 761 n.1 (11th Cir. 2005) (declining to address similar issue and stating that "we do not

has endeavored to promote accurate claims determination). Moreover, Liberty's decision to reinstate Plaintiff's benefits on multiple occasions during the pendency of her administrative appeal-which ultimately compensated Plaintiff for 13 of 24 months of her "own occupation" disability benefit until the final resolution of her appeal-weighs against finding that Liberty acted arbitrary and capriciously in its decision. Id.

15. Plaintiff contends, citing Glenn, that Liberty failed to weigh the effect of the Social Security Administration's decision to award her disability payments. At trial, Plaintiff stated during oral argument that the Social Security Administration awarded her such payments in 2005 and retroactively compensated her for her disability in the years 2003 and 2004. However, unlike in Glenn, no evidence of the Social Security Administration's decision was included within the administrative record in this case because Plaintiff had already exhausted her administrative remedies prior to

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decide whether district courts are limited to determining whether the reasons proffered by an ERISA plan administrator are the only reasons district courts can consider on appeal").

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the Social Security Administration's decision.[5] Accordingly, it was not unreasonable for Liberty to fail to reconcile the determination of the Social Security Administration with its own determination because, at the time the Social Security Administration's determination was made, the administrative process had been closed. See Parness, 291 F. Supp. 2d at 1356-57 (review of benefits decision is limited to evidence present before the administrator at the time of the decision).

16. Plaintiff also contends that Liberty failed to weigh the opinions of its own medical record examiners which led it to initially approve her disability claim in April 2004. Two examiners concluded that plaintiff's medical records supported her diagnosis of cervical radiculopathy, and that her medical care, and disability award had been appropriate. However, it was not unreasonable for Liberty to reexamine the basis for its original decision to deny benefits and to afford more weight to the opinions of the doctors who examined

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[5] Although it is perhaps beside the point, the Court also notes that no evidence of the Social Security Administration's award was introduced at trial.

Plaintiff than its own consultants who examined only Plaintiff's records. As was the case in Doyle, the Plan in this case "permits Liberty Life to terminate benefits unless the plan participant proves that she satisfies the [disability] definition. Liberty Life had no obligation to explain...how [Plaintiff's] condition had changed" from the time it had decided to award benefits to the time it decided to terminate benefits. Doyle, 542, F.3d at 1362. Rather, "[t]he burden fell on [Plaintiff] to establish that she was entitled to LTD benefits." Id.

17. Plaintiff also contends that the conflict of interest that Liberty suffers combined with the medical evidence which supports a finding of disability in this case entitles her to judgment. As discussed above, the Court is obligated to consider Liberty's conflict of interest as a factor in determining whether Liberty acted arbitrarily and capriciously in denying Plaintiff disability benefits. Glenn, 128 S. Ct. 2343; Doyle, 542 F.3d at 1360. Although considering Liberty's conflict of interest in the context of the substantial medical evidence of Plaintiff's disability renders this a

close case, Plaintiff has not offered any additional evidence besides the mere existence of the conflict that would indicate that Liberty's conflict of interest undermined its ability to fairly discharge its duties under the Plan. For example, "[t]here is no evidence showing that Liberty Life was influenced by the conflict," such as ""a history of biased claims administration,"" Doyle, 542, F.3d at 1363 (quoting Glenn, 128 S. Ct. 2351). To the contrary, Liberty's repeated efforts to investigate Plaintiff's claim and decision to reinstate Plaintiff's benefits during the course of her appeal mitigates the effect of the conflict of interest in the Court's consideration. Id. (stating that absent evidence that the conflict of interest adversely affected the administrator's decision, "the conflict should have [] little weight in the district court's analysis"). In short, in the context of all of the evidence in this case, the Court cannot conclude that the conflict of interest tips the scale in favor of finding that Liberty's decision to deny benefits was arbitrary and capricious.

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17. In sum, based upon (1) the opinion of Dr. D'Auria that Plaintiff was not disabled and had embellished her symptoms; (2) the report of Dr. Heller that he could not form an opinion as a result of Plaintiff's embellishment of systems; (3) Plaintiff's refusal to attend a functional capacity evaluation at the request of Liberty; (4) the apparent absence of any affirmative course of treatment or medical corroboration of Dr. Stewart's opinion concerning Plaintiff's disability; (5) Plaintiff's apparent failure to follow certain treatment recommendations of the specialists she visited; and (6) Liberty's conduct during the course of Plaintiff's appeal including thorough investigation and voluntary reinstatement of Plaintiff's benefits until the final resolution of her appeal, the Court concludes that Liberty's decision to terminate Plaintiff's benefits was not arbitrary and capricious.

18. Accordingly, Liberty is entitled to judgment in this action.

Conclusion

Based on the foregoing, the Court finds in favor of Defendant and against Plaintiff in this action. The Clerk is **DIRECTED** to **ENTER JUDGMENT** in

favor of Defendant and against Plaintiff.

SO ORDERED this 2nd day of January, 2009.

RICHARD W. STORY
UNITED STATES DISTRICT JUDGE